Mar 3. 1868 - Aff. Miller

SUPREME COURT OF THE UNITED STATES.

No. ~~222~~ 137.

HEMAN NORTON STRONG, APPELLANT,

vs.

A CERTAIN QUANTITY OF WHEAT, LATE THE CARGO OF THE SCHOONER "CONVOY," FREDERICK T. CARRINGTON AND WILLIAM J. PRESTON, CLAIMANTS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

GOVERNMENT PRINTING OFFICE

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1 To the Supreme Court of the United States:

I make return to the "appeal allowed" in the cause hereinafter entitled by a transcript of the record as hereto annexed.

The counsel of—

AUG. A. BOYCE,
Clerk of the U. S. Circuit Court, Northern District of N. Y.

2 Supreme Court of the United States.

HEMAN NORTON STRONG, appellant,
vs.
A CERTAIN QUANTITY OF WHEAT, TO WIT, FIFTEEN THOUsand nine hundred and twenty-one 20-60 bushels of wheat, late cargo of the schooner Convoy, &c., Frederick T. Carrington and William J. Preston, claimants, appellees.

To the Supreme Court of the United States:

The petition of appeal of the above-named Heman Norton Strong respectfully shows that a decree was lately made in the circuit court of the United States for the northern district of New York, in a certain cause of admiralty and maritime jurisdiction pending in the said court, on appeal from a decree of the district court of the United States for said northern district of New York therein, wherein said Heman Norton Strong was appellant, against a certain quantity of wheat, to wit: fifteen thousand nine

3 hundred and twenty-one 20-60 bushels of wheat, late cargo of the schooner Convoy, and in which cause Frederick T. Carrington and William J. Preston, were appellees, in and by which said decree it was ordered, adjudged, and decreed that the said decree of the said district court of the United States for said district be affirmed, which said decree of said circuit court is, as this appellant is advised, erroneous and ought to be reversed. Wherefore this appellant respectfully prays that the said decree of said circuit court may be reversed, and that such other decree may be made by this court as shall be agreeable to equity and good conscience, and this appellant may be restored to all things which he has lost by said decree of said circuit court.

And this appellant, as in duty bound, will ever pray.

Dated Dec. 30, 1862.

H. NORTON STRONG,
By GEORGE B. HIBBARD,
Proctor and Att'y.

GEORGE B. HIBBARD, *Att'y and Proctor.*

Appeal allowed Dec. 30, 1862.

N. K. HALL,
Judge U. S. Cir. Court N. Dist. of N. Y.

Filed January 2d, 1863.

4 Circuit court of the United States for the northern district of New York, in admiralty.

HEMAN NORTON STRONG, appellant,
vs.
A CERTAIN QUANTITY OF WHEAT, TO WIT, FIFTEEN THOUsand nine hundred and twenty-one 20-60 bushels of wheat, late cargo of the schooner Convoy, &c., Frederick T. Carrington and William J. Preston, claimants.

The above-named appellant conceiving himself aggrieved by the final

sentence or decree entered in the above-entitled cause, on or about the 23d day of October, 1862, doth hereby appeal therefrom and from each and all parts thereof, to the Supreme Court of the United States, and he prays that this appeal may be allowed, and that a transcript of the record, proceedings, and evidence in the cause, duly authenticated, may be sent to the said Supreme Court.

Dated at Buffalo, in said district, this 30th day of December, 1862.

H. NORTON STRONG,
By GEORGE B. HIBBARD,
Proctor and Attorney.

GEORGE B. HIBBARD, *Proctor and Attorney.*

5 I hereby allow the within appeal, Dec. 30, 1862.

N. K. HALL,
Judge U. S. Cir. Court N. Dist., N. Y.

Filed January 2d, 1863.

6 Supreme Court of the United States.

HEMAN A. STRONG, appellant,
vs.
A CERTAIN QUANTITY OF WHEAT, &c., appellees.

NORTHERN DISTRICT OF NEW YORK,
City and County of Oswego, ss:

Sidney M. Tucker, being duly sworn, says that on the second day of January, in the year 1863, he served the annexed citation on Grant & Allen, esquires, and on William J. Preston, at the city of Oswego aforesaid; that such service was made on said Grant & Allen, by delivering to and leaving with Edwin Allen, esquire, one of the law firm of Grant & Allen, at their law office in said city of Oswego, a copy of the said citation, and at the same time showing to him the original citation hereto annexed; that such service was made on said William J. Preston, by delivering to and leaving with him a copy of said citation at the city of Oswego, and at the
7 same time showing to him the said original.

And deponent further says that on the third day of January, in the year 1863, he served the said citation on Frederick T. Carrington, at said city of Oswego, by delivering to and leaving with him a copy thereof, and at the same time showing to him the said original.

SIDNEY M. TUCKER.

Subscribed and sworn to before me this 3d day of January, A. D. 1863.

ALBERTUS PERRY, *U. S. Commissioner.*

Filed January 6th, 1862.

8 UNITED STATES OF AMERICA, *ss:*

To Frederick T. Carrington and William J. Preston, greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, on the first Monday of December, 1863, pursuant to an appeal from the decree of the circuit court of the United States for the northern district of New York, wherein Heman Norton Strong is appellant and you are appellees, to show cause, if any there be, why the said decree should not be corrected and speedy justice be done to the parties in that behalf.

Witness the Honorable Samuel Nelson, one of the justices of the said Supreme Court of the United States this 30th day of December, 1862.

N. K. HALL,
Judge of the Circuit Court of the United States for the Northern District of New York.

GEORGE B. HIBBARD, *Proctor and Attorney for Appellant.*

Filed January 6th, 1862.

10 Circuit court of the United States in and for the northern district of New York, in admiralty.

HEMAN NORTON STRONG, appellant,
vs.
A CERTAIN QUANTITY OF WHEAT, TO WIT, FIFTEEN THOUSAND nine hundred and twenty-one 20-60 bushels of wheat, late cargo of the schooner Convoy, &c., Frederick T. Carrington and William J. Preston, claimants, appellees.

I, Augustus A. Boyce, clerk of the circuit court of the United States in and for the northern district of New York, in the 2nd circuit, do hereby certify that the following is a true and correct copy of the whole of an enrolled decree made and filed of record in my office in the above-entitled cause.

11 In testimony whereof I have hereunto subscribed my name, and have hereto affixed the seal of the said circuit court at my office, in Utica, in said district, this 1st day of May, in the year of our Lord [SEAL.] one thousand eight hundred and sixty-three, and of the independence of the United States the 87.

AUG. A. BOYCE, *Clerk.*

12 Circuit court of the United States, northern district of New York, in admiralty.

Appeal from the district court of the United States for the said district.

HEMAN NORTON STRONG
vs.
A CERTAIN QUANTITY OF WHEAT, TO WIT, 15,921 BUSHELS and 20 pounds of wheat, late the cargo of the schooner Conway, and now in the Hatch Elevator (so-called) in the city of Buffalo.

1860, Sept. 5.—Libel filed in district court.
" 5.—Stipulation for costs filed.
" 13.—Bond on release of cargo filed.
Oct. 25.—Answer filed.
1862, March 13.—Final decree entered.

13 United States district court, northern district of New York, in admiralty.

On the 5th day of September, 1860, at the city of Buffalo, in the northern district of New York, before Aurelian Conkling, a commissioner duly appointed and empowered to take acknowledgments of bail, affidavits, and depositions, &c., within and for the northern district of New York, Heman Norton Strong, against a certain quantity of wheat, to wit, 15,921 bushels and 20 pounds of wheat, late the cargo of the schooner Convoy, and now

stored in and being in a certain building or elevator commonly called the Hatch Elevator, in said city of Buffalo, in a cause of contract, civil and maritime, moved and prosecuted in the district court of the United States for the northern district of New York, which day appeared personally Samuel K. Worthington, commission merchant of said city of Buffalo, and submitting himself to the jurisdiction of the court, bound himself, his heirs, executors, and administrators, in the sum of $250, for the benefit of whosoever it may concern, that the said Heman Norton Strong shall prosecute his action in this behalf, and abide by all orders, interlocutory and final, of the aforesaid court, and pay the costs and expenses, if any, which shall be declared
14 against him by the final decree of the aforesaid court, or of any appelate court; and unless he shall so do, the said Samuel K. Worthington does hereby consent that execution shall issue forth against him, his heirs, executors, and administrators, goods, and chattels, wheresoever the same may be found, to the value of the sum above mentioned.

SAMUEL K. WORTHINGTON.

Taken, signed, and acknowledged at the day and city first mentioned above, before me.

AURELIAN CONKLING, *Com. of the U. S.*

NORTHERN DISTRICT OF NEW YORK, *City of Buffalo, ss:*

Samuel K. Worthington, being duly sworn, says that he resides and is a freeholder in the city of Buffalo, in the northern district of New York, and that he is worth the sum of $500 after the payment of his just debts, and over and above all claims and demands against him, and exclusive of property exempt from execution.

S. K. WORTHINGTON.

Subscribed and sworn before me this 5th day of September, 1860.

AURELIAN CONKLING, *Com. of the U. S.*

15 UNITED STATES OF AMERICA,
Northern district of New York, ss:

The President of the United States to the marshal of the northern district of New York, and his deputy whosoever, greeting:

You are hereby jointly and severally empowered and strictly enjoined and commanded that you arrest the vessel called a certain quantity of wheat, being 15,921 bushels and 20 pounds, now at the Hatch Elevator at Buffalo, if the same shall be found within your district, and the same so arrested you keep under safe and secure arrest until you shall receive further orders from the said court, or the same shall be discharged in due course of law, and that you cite at the premises all persons in general who have or pretended to have any right, title, or interest therein, to appear before the judge of the district court of the United States of America for the northern district of New York, at the city of Buffalo, on the 25th day of September instant, if it be a court day, or else on the court day next following, at 10 o'clock in the forenoon, there to answer unto Heman Norton Strong, of Detroit, in the State of Michigan, in a cause of contract, civil and maratime, and further to do and receive in this behalf as to justice shall appertain, and that you duly certify the judge of the aforesaid court what you shall do in the premises, together with these presents.

16

Witness the Honorable Nathan K. Hall, judge of the aforesaid court, at the city of Buffalo, this 5th day of September, in the year of our Lord one thousand eight hundred and sixty.

(a) Action for $2,928 30.

GEO. B. HIBBARD, *Proctor.*
AURETIAN CONKLING, *Clerk.*

Marshal's return.

On the 6th day of September, 1860, I arrested the within mentioned wheat and on the 12th day of September inst., having received a bond in due form duly approved and conditioned, to abide the decree of the court in the cause within mentioned, I released the said wheat, and returned this process with the said bond accordingly.

Buffalo, September 12th, 1860.

JAMES B. HOWE, *U. S. Marshal.*
LEVI H. WILLIAMS, *Deputy.*

17 Know all men by these presents that we, Fredrick T. Carrington and William J. Preston, of Oswego, as principals, and Charles Smyth and Philo Stevens, of the same place, sureties, are held and firmly bound unto Heman Norton Strong, of the city of Detroit, in the penal sum of 5,700 dollars, to be paid unto the said Heman Norton Strong, his executors, administrators, and assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and assigns, jointly and severally by these presents.

Sealed with our seals, and dated the 8th day of September, 1860.

Whereas in a certain case of civil and maritime moved and prosecuted in the district court of the United States for the northern district of New York, on behalf of the above-named Heman Norton Strong, against a certain quantity of wheat, to wit, 15,921 bushels and 20 pounds of wheat, late the cargo of the schooner Convoy, and now in the Hatch Elevator, so called, in the city of Buffalo, a warrant of arrest has been issued out of the said court against the said cargo of wheat, which said warrant is now in the hands of the deputy of the marshal of the said district at Buffalo, and by virtue of the said warrant the said cargo is held under the said arrest by the said deputy, and is now in his custody: Now, therefore, the condition of this obligation is such that if the above bounden Frederick T. Carrington and William

18 J. Preston, the claimants of the said wheat, shall well and truly abide and answer the decree of the said court in the aforesaid cause, then this obligation shall be void; otherwise, it shall remain in full force and virtue.

WILLIAM J. PRESTON.
PHILO STEVENS.
CHARLES SMYTH.

Taken and acknowledged before me on the 8th day of September, 1860, by William J. Preston, Chas. Smyth, and Philo Stevens.

ALBERTUS PERRY, *U. S. Comm.*

NORTHERN DISTRICT OF NEW YORK, *Oswego Co., ss:*

William J. Preston, Philo Stevens, and Charles Smyth, being duly sworn, say, each for himself, *says* that he is a householder and freeholder within the county of Oswego; that he is worth the sum of $5,700 over and above all debts and liabilities and property exempt by law from execution.

WM. J.
PHILO STEVENS.
CHARLES SMYTH.

Subscribed and sworn before me September 8th, 1860.

ALBERTUS PERRY, *U. S. Comm.*

19 U. S. district court, northern district of New York, in admiralty.

To the Honorable Nathan K. Hall, judge of the United States district court for the northern district of New York:

Heman Norton Strong exhibits that his libel against a certain quantity of wheat, to wit, 15,921 bushels and 20 pounds of wheat, late the cargo of the schooner Convoy, and now stored in and being in a certain building or elevator, commonly called the Hatch Elevator, so-called, in the city of Buffalo, and against all persons lawfully intervening for their interest therein in a cause civil and maritime, and thereupon the said libellant does allege and articulately propound as follows:

1st. That the libellant during all the times in this libel mentioned did reside and thence hitherto has resided, and still resides at Detroit, in the State of Michigan, and during all said times was and now is owner of the schooner Convoy, and entitled to receive the freight and claims and demands hereinafter mentioned.

2d. That during all the times in this libel mentioned the said schooner was, and thence hitherto has been and is a maritime vessel of more than 25 tons burthen, enrolled and licensed for coasting trade, and employed in the business of commerce and navigation between port and places in dif-
20 ferent States and Territories upon the lakes and navigable waters connecting the said lakes, within the true intent and meaning of the act of the Congress of the United States of America entitled "An act to extend the jurisdiction of the district courts to certain cases upon the lakes, and upon the navigable waters connecting the same," passed February 26, 1845.

3d. That heretofore, and on the 18th day of August, 1860, the said schooner lay at Chicago, State of Illinois, in the pursuit of and then ready to depart from said port in her aforesaid business; that upon the said last mentioned day E. H. Wallcott shipped upon the said schooner, and the said schooner and the master and owner received on board said schooner the certain quantity of wheat aforesaid, which the said shipper agreed should be carried, and which the said schooner, master, and owner agreed said schooner would carry from Chicago aforesaid to Port Colbourne, in Canada, for the freight mentioned in a bill of lading, which was on said last mentioned duly executed and delivered in triplicate by the said shipper and the master of said schooner, a copy of which bill of lading, exclusive of the signatures thereto, is hereby annexed and made part of hereof, and marked Schedule A; that the said schooner, and the master and owner thereof, agreed that the
21 said quantity of wheat should, pursuant to the said bill of lading and contract, be carried and delivered by the said schooner at said Port Colbourne, and each and all the other parties to said bill of lading and contract of affreightment (except said schooner, master, and owner) agreed that they would receive the same cargo from the said schooner on her arrival at said Port Colbourne, and would then and there relieve the said schooner therefrom, and pay the freight thereon from the said Chicago to the said Port Colbourne. That the said schooner, master and owner thereof did not, nor did any or either of them, ever in fact agree to carry said property from Chicago to any other place than said Port Colbourne, but did agree to carry the said wheat from said Chicago to said Port Colbourne, and there deliver the same, as the same as aforesaid was agreed to be received to be carried from thence, as in the said bill of lading; that if the said bill of lading expresses any other or different agreement, the same is so expressed by mistake, and the said libellant prays that the same may be reformed and altered to conform to the contract of affreightment as aforesaid made.

4th. That the said schooner in performanne of her duties under said
22 contract and bill of lading, departed from said port of Chicago with said quantity of wheat and cargo on board, and safely arrived at Port Colbourne, in the said bill of lading mentioned, on the 28th day of August, 1860, and then earned freight on said cargo; that upon the arrival of the said schooner at said Port Colbourne the said schooner and said master and owner tendered and offered, and was ready and willing to deliver the said quantity of wheat, pursuant to the said bill of lading and said contract of affreightment, and duly requested that proper means, receptacle, and place should be provided for the unloading, receipt, and storage of said quantity of wheat; that the said Willand railway in said bill of lading mentioned, (meaning the Welland Railway Company,) and the shipper and consignee of the said quantity of wheat, then and there neglected and refused to receive said wheat, and to provide proper means, place, and receptacle for the unlading, receipt, and storage of the said wheat, and to pay the said schooner, master, or owner the freight, lein, or charges accrued in the premises, and all parts thereof; that the said schooner and the master thereof endeavored to procure means, place, and receptacle for the unloading, receipt, and storage of the said quantity of wheat at said Port Colbourne; that the said schooner and the said master were unable to find or procure either of
23 the same for any part of said wheat, and there was none for any part of said wheat at said Port Colbourne, or nearer there than the city of Buffalo, in the State of New York; that at the city of Buffalo there was the nearest and proper means, place, and receptacle for the unloading, receipt, and storage of the said quantity of wheat; that thereupon, and on the 30th day of August, 1860, the said schooner proceeded from the said Port Colbourne to the city of Buffalo, and there by proper means unloaded the said quantity of wheat, and discharged the cargo consisting thereof, and the said schooner and master caused the said quantity of wheat to be received and stored where the same now lies in store in a proper elevator or warehouse in said city of Buffalo, subject to the liens and charges thereupon herein mentioned, and the same still is in the possession of the said libellant, which possession has never been surrendered, and is now retained under the lien on said quantity of wheat for the liens and claims thereon herein mentioned, and possession of which quantity of wheat the said libellant is ready to deliver to the party entitled to the same on payment of said liens and charges and sums hereinafter mentioned.

5th. That the schooner and master were thus obliged to proceed
24 to said Buffalo, and there to store said cargo as aforesaid; that the said schooner was, as aforesaid, unreasonably and improperly detained at said Port Colbourne, in consequence of the aforesaid improper act and neglect of the said railway company, and of the said consignor and consignee of the said cargo is entitled to demand and receive demurage or pay for the detention of the said schooner in the premises for two days; that the said schooner and the owner thereof is reasonably entitled to have and receive for said demurrage or detention the sum of $150; that the use of said schooner during said last mentioned time was worth, and she then could have been chartered for the said last mentioned sum; that the carriage of the said quantity of wheat from said Port Colbourne to said city of Buffalo was and is reasonably worth the further sum of $175, which said last mentioned sum the said schooner and the owner thereof is entitled to receive therefor; that no part of the said freight agreed to be paid in and by said bill of lading, or the interest which has accrued thereon, has been paid, and that the payment thereof, and of all parts thereof, has been and now is neglected and refused to be made, and that the said libellant has a lien upon the said quantity of wheat for the said demurrage and the damages

25 sustained by such detention, the worth and value of the carriage of said wheat from said Port Colbourne to said Buffalo, and the freight so as aforesaid agreed to be paid by said bill of lading, no part of any of which claims or liens has ever been paid, although payment of the same has been duly requested.

6th. That upon the arrival of said wheat in said city of Buffalo, the said libellant was and has been obliged for the safety of the said wheat, to have the same elevated into and stored into, and the same has been elevated into and is now stored in the said elevator, commonly called the Hatch Elevator, in the said city of Buffalo; that the necessary charges and expenses for such elevating and storage, and which libellant has been or will be obliged to pay, and has become liable to pay, are and will be as follows; that is to say, for the elevating of said wheat as aforesaid, and the storage of the same as aforesaid, for the first five days of the time during which the same shall be stored as aforesaid, one half a cent for each and every bushel of said wheat; for the storage as aforesaid of said wheat for the second 5 days of the time during which said wheat shall be stored as aforesaid, one quarter of a cent for each and every bushel of said wheat, and one quarter of a cent for

26 each and every bushel of said wheat for each and every succeeding ten days after said second five days of the time during which said wheat shall be stored as aforesaid, and that said libellant has also become liable to pay certain commissions and charges in and about the procuring of said wheat to be elevated and stored, and cared for in said city of Buffalo as aforesaid, at the rate one half a cent for each and every bushel of said wheat, and which commission and charges for commissions amount in the aggregate to the sum of $78 and 60 cents. And that said libellant has effected an insurance upon said wheat, and upon every part thereof so stored as aforesaid, for the benefit of the parties interested in said wheat, as it was reasonable and proper he should do, the premium or premiums of and for which insurance, and the amount or amounts which said libellant has been or will be necessarily obliged to pay for such insurance, will amount to a sum not exceeding 500 dollars, but the exact amount thereof the said libellant is unable at this time to state, for the reason that said libellant is unable to state the time which it will be necessary to keep said insurance on said wheat, and that the said libellant also claims a lien upon said quantity of wheat and every part thereof, for and to the amount of such sum as he has

27 paid or will hereafter be obliged to pay, as aforesaid, for and on account of such elevating, storage, commissions, charges, insurance, and premium or premiums of insurance hereinbefore mentioned, and that no part of such last-mentioned liens has ever been paid or discharged, and the said libellant claims to recover the amount of the same and every part thereof in this suit.

7th. That the said libellant in making the aforesaid bill of lading or contract of affreightment relied upon the said cargo as well as upon the consignor or consignees thereof, for his freight claims and demands in the premises.

8th. That there is due to the said libellant, by reason of the premises, the sum of each and all said claims and demands herein mentioned or referred to and interest from the filing of this libel, over and above all payments, setoffs, and discounts. That the amount of such freight for the carriage of said property to said Port Colbourne is $1,353 30, besides interest. That the amount of the said claim for said demurrage and detention at Port Colbourne is $150, besides interest. That the amount of said claim for said freight from said Port Colbourne to Buffalo is $175, besides interest. That the aggregate amount of said claims and demands for said elevating, storage, commissions, and insurance will not exceed $1,000.

28 9th. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this court, the said quantity of wheat now being in the said city of Buffalo.

Wherefore the said libellant prays that process in due form of law may issue against the said quantity of wheat, and that this honorable court will pronounce for the aforesaid liens, claims, and demands, and decree the same to be paid with costs, that the said bill of lading as aforesaid, if necessary, may be reformed and altered as aforesaid prayed, and so as to conform to the actual contract made in the premises as herein alleged, and for such other and further relief as to right and justice may appertain and as the court is competent to give in the premises.

H. N. STRONG.

GEO. B. HIBBARD, *Advocate.*

STATE OF NEW YORK,
County of Erie, city of Buffalo, to wit:

On this 4th day of September, 1860, personally appeared before me Heman Norton Strong, and was sworn to the truth of the foregoing libel.

29 P. P. NICHOLS, *U. S. Comm'r.*

SCHEDULE A.

CHICAGO, *Aug.* 18, 1860.

Shipped in good order and condition by E. G. Woolcott, on board the schooner Convoy, of , whereof is master, the following articles marked and numbered as in the margin, to be delivered in like good order and condition, (the damages of navigation alone excepted,) unto consignee, as per margin, or to his assigns, freight and charges to be paid as noted below upon the actual and complete delivery of the said goods and freight to said consignee or their assigns.

In witness the master of said vessel hath affirmed unto three bills of lading, all of this tenor and date, one of which being accomplished, the other to stand void.

Ac. J. H. Burch & Co., care Carrington & Preston, Oswego, N. Y.

16,014 35-60 bushels No. 1 spring wheat, 16,014 35-60 freight to Port Colbourne 8½ cts p'r pushel, via Welland railway, from Port Colbourne

30 to Port Dalhouse, then by rail or steam vessel to Oswego, N. Y.

In admiralty.

The answer of Frederick T. Carrington and William J. Preston, owners, consignees, and claimants of a certain quantity of wheat, to wit, 15,921 bushels and 20 pounds of wheat, late the cargo of the schooner Convoy, and now (at the time of the filing of the libel) in the Hatch Elevator, so called, in the city of Buffalo, to the libel of Heman Norton Strong, against the said wheat.

And now comes the said Frederick T. Carrington and William J. Preston, of the city of Oswego, and State of New York, owner, consignee, and claimants of the said wheat, and for answer to the libel of Heman Norton Strong, against the said quantity of wheat, late of the schooner Convoy, doth allege and propound as follows, to wit:

1st. That the said libellant did at the time in the libel mentioned reside and still doth reside at Detroit, in the State of Michigan. But these claimants on information and belief deny that the said libellant was at or during any of the time or times in said libel mentioned, or now is, owner of the

schooner Convoy in the said libel mentioned and referred to, and deny that he is or was entitled to receive the freight and claims and demands
31 in said libel mentioned, or any or either of them; on the contrary thereof, the said claimants, answering upon information and belief, state and aver that the said schooner Convoy in said libel named did, at the several times therein stated, belong to and was owned by one John Owens, of the city of Detroit, and was alone entitled to receive the said freights, claims, and demands in said libel mentioned and referred to if any one was entitled to the same under the facts and circumstances set forth in this the answer of the said claimants.

2d. These claimants admit that during all the time mentioned in the libel the said schooner Convoy was and is a maritime vessel of more than 25 tons burthen, enrolled and licensed for the coasting trade, and employed in the business of commerce and navigation between ports and places in different States and Territories, upon the lakes and navigable waters connecting said lakes, within the true intent and meaning of the act referred to in the 2d paragraph of said libel.

3d. In answer to the third paragraph of said libel, the said claimants admit and say that the said schooner at or about the time therein stated, lay at Chicago, in the State of Illinois, in the pursuit and then ready to depart from said port upon her aforesaid business, and that E. G. Wolcott, in said article named as shipper, shipped on said schooner, and the said
32 schooner and the master and owner thereof, received on board the said schooner 16,014 bushels and 35 pounds of wheat, to be conveyed and carried from Chicago aforesaid to the port of Oswego, in the State of New York, and there delivered to said claimants doing business at Oswego, under the name and firm of Carrington & Preston, upon the payment of the freight stated in the bill of lading hereto annexed, marked "A" which was on the day of the date thereof executed by the parties thereto, and delivered in triplicate by the shipper and the parties agreeing to carry said wheat to Oswego aforesaid to the said claimants, as the written evidence of the contract and agreement for the carrying and transporting said wheat from Chicago to Oswego aforesaid. These claimants state and aver, upon information and belief, that no other or different contract or agreement was made or entered into for the conveying of said wheat than as herein stated and evidenced by the bill of lading and agreement hereto annexed, and marked "A," and making a part of this answer; and these claimants deny each and every allegation in the third paragraph of said libel contained not herein admitted or traversed, and which is inconsistent or different than the contract herein set forth, and contained in the bill of lading hereto annexed.
33 That these claimants, on information and belief, expressly deny that the agreement contained in said bill of lading, and as expressed therein, is or was expressed by mistake, or that the same ought or can be reformed by this court.

4th. That the said schooner, in part performance of her duties under the said contract, departed with the said cargo on board, and arrived at Port Colbourne on or about Aug. 28th, 1860, and then and there on the day aforesaid offered to deliver the said wheat to the said Welland Railway Company; but these claimants, on information and belief, deny that the said railway company neglected or refused to receive said wheat, or to provide proper means, place, and receptacle for the unloading, receipt, and storage of the said wheat, or to pay the said schooner master or owner, the freight, or that the master thereof endeavored to procure means, place, or receptacle for the unloading, receipt, and storage of the same at Port Colbourne. But whether the said schooner or master was unable to procure the same for any part of the said wheat at said Port Colbourne or nearer there than at the said city

of Buffalo, or whether the city of Buffalo was the nearest place or receptacle for the unloading, receipt, or storage of the said wheat, the said claim-
34 ants are ignorant, and have not a sufficient knowledge to form a belief. But these claimants admit that the said schooner on the 3d day of August, 1860, proceeded to Buffalo from Port Colbourne, and there discharged and caused to be stored 15,921 bushels and 20 pounds of wheat, from the said schooner in Hatch Elevator, so called, in the city of Buffalo, for account of Alexander McKindy, the master of the said schooner. And these claimants deny that the said wheat was stored, or that the same at the time of the filing of the said libel was lying in store subject to the liens and charges thereupon, or that the said wheat was at the time of the filing of the said libel *was* in possession of said libellant, or that he could deliver the same upon the payment of the said pretended liens and charges in the said libel set forth and stated.

5th. These claimants, in answer to the 5th paragraph, deny that the master or said schooner was obliged to proceed to Buffalo to store said cargo, or that said schooner was unreasonably or improperly detained at said Port Colbourne, or that, in consequence of any detention or improper acts of the said railway company, or of the consignor or consignee of the said
35 cargo, the said libellant is entitled to demand or receive damages or pay for any detention of said schooner, for 2 days or any other time, or that he is reasonably entitled to receive for dummerage one hundred and fifty dollars or any other sum, or that the said schooner, during said time, was worth that sum, or that she could have been chartered for that sum; and the claimants deny that the carriage of said wheat from Port Colbourne to Buffalo was worth the sum of 175 dollars, or that the schooner or owner is entitled to receive said sum; and the said claimants deny that the libellant has a lien upon the said quantity of wheat for the dummerage and the damages sustained by said pretented detention, or for freight on said wheat, as claimed in said libel, or for any or either of the said pretended claims.

6th. The claimants, in answer to the sixth paragraph of said libel, say that all the charges mentioned therein and referred to therein have been fully paid and discharged by them since the filing of the said libel, except the premium of insurance, also in said article mentioned. These claimants deny that the said libellant has or can have any lien upon the said wheat for any premium of insurance procured thereon.

36 7th. Whether the libellant, in making the bill of lading or contract of affreightment, relied upon the said cargo, as well as upon the consignor or consignee thereof, for his freight claims and demands these claimants cannot state.

8th. These claimants deny that there is due to the said libellant, by reason of the premises or otherwise, the sum of each and all the said claims and demands in said libel mentioned or referred to in either or any of them, or any part thereof.

9th. These claimants, in further answering, say that the said schooner Convoy arrived at Colbourne aforesaid, with the said cargo of wheat thereon, on the 28th day of August, 1860, as they are informed and believe; that at said time there was a number of vessels at said Port Colbourne, ladened with produce, and which had arrived thereat before the arrival of the said schooner Convoy, and which were first entitled by reason of their first arrival to be first discharged and unloaded by the said Welland Railway Company, and which was well known to the master of the said schooner Convoy; that all of the vessels then at Port Colbourne, and which had arrived before the schooner Convoy, laden with produce as aforesaid, were consigned and were to be discharged by the said railway company, and the
37 cargoes thereof were to be transported by said company on the said

railway, and over the same to Port Dalhouse; that the said railway from the time of the arrival of the said schooner Convoy at Port Colbourne aforesaid, and for a long time previous thereto, had been and was in perfect order, and all its facilities had been during all said time in constant use, night and day, discharging as fast as it was possible for them to discharge such vessels laden as aforesaid with produce, to be transported in the order in which it arrived over said road; that the said railway informed the said master of the schooner Convoy that the said schooner should and would be discharged in her turn, and as soon as the vessels which had arrived before her, and then and there requested the said master to continue at said Port Colbourne until the said vessels which had previously arrived were first discharged; that the said master then and there refused to comply with said reasonable request, as it was his duty to have done, and left Port Colbourne and sailed for Buffalo, in violation of his said contract and of his duty in the premises, and discharged the said cargo or a portion thereof at the city of Buffalo, and stored the same in the Hatch Elevator, so called, on his own account, and took a receipt therefor in his own name, by the terms of which the said receipt was not transferrable, or the said wheat deliverable to any other person, or the owners or consignees thereof upon the payment of charges therein.

38

10th. The said claimants, in further answering, say that by the terms and time intent and meaning of the contract of affreightment, the said wheat was to be delivered to them at Oswego, as the consignees thereof, and that no freight was to be paid by them until the said cargo had first arrived at the port of Oswego, and delivered to them in pursuance of the said bill of lading hereto annexed. These claimants therefore insist that the said schooner and master have not performed the said contract, or their part, and the libellant or any other person is entitled to recover or receive any freight or any claim or demand, on account of transporting said cargo.

11. The claimants further say that the said schooner or master has not delivered the whole of the said cargo; on the contrary thereof, the said claimants say that they have failed and neglected to deliver 93 bushels and 15 pounds of wheat, part and parcel of the said cargo, of the value of the sum, to wit, $150.

12th. That all and singular the premises are true.

Wherefore the respondent prays that this honorable court will be pleased to pronounce against the libel aforesaid, and to condemn the libellant in costs, and otherwise right and justice to administer in the premises.

39

F. T. CARRINGTON.
WILLIAM J. PRESTON.

GRANT & ALLEN, *Proctors.*

STATE OF NEW YORK, *County of Oswego, ss:*

On this 24th day of October, 1860, personally appeared Frederick T. Carrington and William J. Preston, and were sworn to the truth of the foregoing answer.

ALBERTUS PERRY, *U. S. Commissioner.*

SCHEDULE A.

CHICAGO, *Aug.* 18*th*, 1860.

Shipped in good order and condition by E. G. Wolcott, on board the schooner Convoy, of , whereof Alexander McKimley is master, the following articles, marked and numbered as in the margin, to be delivered in like good order and condition, the damages of navigation only excepted, unto consignee, as per margin, or to his or their assigns, freight and charges to be

paid as noted below, upon the actual and complete delivery of the said goods and freight to said consignor or their assigns.

40 In witness whereof, the master of said vessel hath affirmed unto four bills of lading, all of this tenor and date, one of which to be accomplished, the others to stand void.

ALEXANDER McKIMLY.

16,014 35-60 bushels No. 1 spring wheat, freight to Port Colbourne 8½ cents per bushel. Freight from Port Colbourne to Oswego 4½ cents p'r bushel, to be shipped from Dalhouse by steam or sail vessel classing not below standard. Dangers of navigation excepted.

For Welland Railway—

WALKER & BROTHERS, *Ag'ts.*

Ac. J. H. Burch & Co., care Carrington & Preston, Oswego, N. Y., via Welland Railway, from Port Colbourne to Port Dalhouse, thence to Oswego by sail or steam vessel.

41 The following is the testimony of William H. Goodman, taken on commission in Chicago:

My name is William H. Goodman; I am 38 years old; I am a vessel agent, and I reside in Chicago, in the State of Illinois. I know the parties to this suit; I am the agent of the libellant, and have been acting as such agent for this libellant, for his vessel, and all other business for the last four years. During the year 1860, the schooner Convoy was owned by H. N. Strong, the libellant; he was known as the owner, and she was originally built for him by contract. During the whole of the year 1860 he received the freight for her, and chartered her as opportunity offered, either by himself or agent.

On or about the 18th August, A. D. 1860, I, as the agent of H. N. Strong, chartered the schooner Convoy, which was then at the port of Chicago, to Mr. E. G. Wolcott, a commission merchant on South Water street, Chicago, Illinois, to carry a cargo of wheat from Chicago to Port Colbourne, in Canada, at 8½c. p'r bushel freight; this is the cargo now in controversy in this suit. At the time of making said contract or charter, no other destination or port

42 was named but Port Colbourne. Mr. Wolcott made out some bills of lading for me, leaving the number of bushels of wheat blank for the captain to sign, as she would not be loaded until after office hours; the captain signed the bills of lading, and I took them to the office of Mr. Wolcott next morning; the bills of lading signed by the captain were three in number; the fourth bill of lading, which is here presented and annexed to my deposition as Exhibit A, is signed by the shipper, E. G. Wolcott, and is an exact copy of the three bills of lading signed by the captain, before referred to, with the exceptions of the names of the signers to said bills of lading; the number of bushels of wheat was not inserted into any of the bills of lading until they were signed by both parties; the number of bushels were inserted by Mr. Wolcott himself, after the signing of the bills of lading by all the parties. In the bill of lading marked as Exhibit A, hereto attached, the word "via" was intended by me or construed by me as having the same meaning as "care" of the Welland Railway. At the time this cargo was shipped and the bills of lading were signed there was no contract or any other understanding of whatever kind for the transportation of the

43 cargo to Oswego or any other port; it was only from Chicago to Port Colbourne the said contract was made for.

The following is the testimony of E. G. Wolcott, taken on commission in Chicago:

My name is Ebenezer G. Wolcott; I am 45 years old; I am a commission

merchant, and I reside in Chicago, in the State of Illinois; I know the parties to the suit, and I contracted with Mr. Goodman for the schooner Convoy about the 18th of August, 1860, to take a cargo of wheat from Chicago to Port Colbourne, and I think I made a contract with one of the Mr. Walkers to take it from there through to Oswego. Walker was agent of the Welland Railway Company; I am the agent of Carrington & Preston, in Chicago, in doing their business in Chicago, more or less, and in making contracts for freight. My intention was in making my papers was for making the vessels and railroads liable until the arrival at the place of destination. My only conversation and understanding with Mr. Goodman was in relation to Port Colbourne only, and that was the contract made with Mr. Goodman from Chicago to Port Colbourne.

44 EXHIBIT A.

CHICAGO, *Aug.* 18, 1860.

Shipped in good order and condition by E. G. Wolcott, on board the schooner Convoy, of , whereof is master, the following articles, marked and numbered as in the margin, to be delivered in like good order and condition, (the damages of navigation alone excepted,) unto the consignee, as per margin, or to his or their assigns, freight and charges to be paid as noted below upon the actual and complete delivery of the said goods and freight to said consignee or their assigns.

In witness whereof, the master of said vessel hath affirmed unto three bills of lading, all of this tenor and date, one of which to be accomplished the other to stand void.

16,014 35-60 bushels No. 1 spring wheat, (16,014 35-60;) freight to Port Colbourne 8½ cents pr. bushel.

1,361 24. E. G. WOLCOTT, *Agt.*

Ac. J. H. Burch & Co., care Carrington & Preston, Oswego, N. Y., via Welland railway, from Port Colbourne to Port Dalhouse, thence by sail or steam vessel to Oswego.

45 The following is the testimony taken on the trial of the cause :

Steven G. Andrews.

I reside at Detroit; I am a shipper and commission merchant, and have been conected with vessels there some ten years. I know Mr. H. N. Strong and the schooner Convoy. I went from Detroit to Port Colbourne in respect to Mr. Strong's vessel that might be there. I left Detroit some time in August, about the last I think, but I can't state the day. I was authorized by Mr. Strong to attend to his vessels and see to their unloading, &c. I can't tell the day I got to Port Colbourne. Strong instructed me to proceed to Port Colbourne and facilitate the discharging his vessels if possible, and if they could not be discharged in proper time to send them to Buffalo. When I got there the Convoy was not there. She arrived the next morning after I arrived. On my arrival there I notified the parties in regard to the Eagle Wing, another of Mr. Strong's vessels which was then there. I notified the parties having charge of the elevator and, as I supposed, having charge of the Welland railway. I had conversation after the arrival of the Convoy. I went with the captain and bill of lading to the parties who had charge of
46 the elevator and that end of the Welland railway who had charge during Mr. Clark's abscence, and I requested them to state some time when she could be unloaded. They said she could be unloaded in her turn as pr. arrival with other vessels, a list of which they showed me. There were some 13 ves-

sels in the list ahead of the Convoy. I asked them if it was necessary to wait until all those were discharged before she could have her turn of unloading, and they said it was. Nothing else was said at that time. The next morning after she had been there 24 hours, I had another conversation; the master and myself went to the office and told them the vessel was ready to discharge, and asked them if they would receive the cargo or were ready to receive it. I had told them the morning before that the vessel was ready to discharge at the first interview. This second morning I asked them when they would receive it and they said they would receive it in its turn as per arrivals, as they had stated the morning before. I think there had been two cargoes taken out in the preceding 24 hours. I then went with the master to the other end of the Welland Canal, at Port Dalhouse, to see Mr. Cyrus Clark, who I understood was the general agent of the company, (it is admitted that he was such general agent.) I stated to him I had several vessels at Port Colbourne, the Convoy among the rest, which I had control of; that they were anxious to be discharged; that some had been there 24 hours and some longer. His reply was that they had been troubled for cars and had had trouble in getting it away from Port Dalhouse; then, that the warehouse was full there, but he thought that he had got machinery moving, so that they would not be troubled any more for want of cars. And I then requested him to state when these vessels could be unloaded, the Convoy among the rest, and his reply was as soon as they could, and that they would be unloaded in turn as per their arrival at Port Colbourne. I think I said I should have to send the vessels to Buffalo to be unloaded if they were not unloaded in reasonable time. He said they would do all they could but could not state any time. The captain was down there with me and acting in concert with me, but I don't know as he heard this conversation. Clark went up to Port Colbourne immediately. I then telegraphed Strong and received a telegraph from Mr. Wentworth at Buffalo, also one from P. L. Stemberg & Co., at Buffalo. The following morning I went with the master again to the office of the elevator. My requests and their replies were about the same as before. This was the third morning after the arrival of the vessel. I think they were then on the 2d vessel for the 24 hours. On the 4th from our first arrival there, I then instructed the captain to get under weigh and sail for Buffalo and report himself to S. K. Worthington here. The captain went with me on every occasion to those in charge of the elevator at Port Colbourne. In my last conversation I stated to them that I should send the vessels to Buffalo unless they could name some reasonable time when they would be unloaded. Their reply to this was they would do all they could, but we should have to take our turn; that they would not deviate. The Convoy left in the forenoon, I think, of the third day, or about noon. The Eagle Wing remained; she was considerably ahead of the Convoy, 3 or 4 days ahead of the Convoy in her arrival. I think the Eagle Wing unloaded there but I am not positive. I wrote Mr. Strong to instruct the master of the Eagle Wing. I left Port Colbourne the afternoon after the Convoy. I think there were 11 or 12 ahead of the Eagle Wing when I arrived there, and they had decreased until there were 9 or 10 ahead when I left, and I think there were 5 or 6 between her and the Convoy. The propeller Dacotah arrived there after the Convoy and was unloaded at the elevator before the Convoy. It was the Mendota or Dacotah, I can't tell which—one of the N. Y. Central Line propellers. I saw the propeller being unloaded at the elevator. That was on the 3d morning after the Convoy's arrival and the propeller was nearly discharged. She arrived during the night before, and she was nearly discharged. It was one of the N. Y. Central Line of boats. I knew at the time, but I won't be positive, whether it was the Mendotah or Daco-

tah. There is but one elevator at Port Colbourne. There are no other means there for unloading vessels there. I saw no warehouses there. It is a small place; hardly any place. There is an elevator, and there are 4 small groceries, and the head of the canal; no commission merchants there or anything which belongs to a commercial port except this elevator. I can't state the capacity of the elevator, but I should think it could store from 50 to 75,000 bushels; it is not a large elevator. I can judge of its capacity in discharging only from what it did while I was there, when it discharged from 1½ to 2 cargoes in 24 hours. Buffalo is the nearest port where it was practicable to discharge this cargo. Before the Convoy left I had telegraphs from here that she could be discharged immediately on her arrival here. Mr. Worthington had charge of her after she arrived here. The elevator at Port Dalhouse was full, and cars remained on the track with grain in
50 while I was there. There was no means of unloading the Convoy at Port Colbourne except through the elevator, and no means by which she could discharge the cargo. Neither Mr. Wolcott, or Carrington, or Preston, or any one representing them except the railway company, were at Port Colbourne that I saw. I did all I could there to procure the cargo to be unloaded, and the captain acted with me throughout.

Cross-examination.

I arrived at Port Colbourne the day or 2d day before the Convoy arrived. I had, besides the Eagle Wing and Convoy, the barque Torrent in charge. I had been there before; had sailed there. I can't say whether Strong had ever been there or whether the Convoy had been there before. I can't state when the Convoy arrved at Buffalo but I think she arrived the same day she left Port Colbourne. I think I left Detroit the 27th and arrived at Port Colbourne the 28th, and that the Convoy arrived on the morning of the 29th. She laid there two days and three nights. I think she arrived during the night. Early in the evening before the morning on which we reported her arrival. I did not notify the consignee at Oswego or any parties at Oswego. There is a telegraph at Port Colbourne to Oswego. The propeller I spoke of I understood came from Buffalo and had come down, and been re-
51 ported on another vessel, and was unloaded, on the ground that it had been reported there before the other vessels on the list arrived. I think, upon reflection, the Eagle Wing left for Buffalo before the Convoy. She arrived before the Convoy. I think she left Port Colbourne in the morning and the Convoy in the afternoon. From Port Colbourne to Buffalo is about 30 miles; about 25 miles from Port Colbourne to Port Dalhousie. The usual time it takes to discharge such a cargo as that of the Dacotah would be from 5 to 6 hours after she got to the elevator. She had only 17,000 bushels.

Alexander McKimley.

Master of the Convoy in 1860. We arrived at Port Colbourne between 9 and 10 in the evening, and left about 1 o'clock of the 3d day. We were there two full days, and left in the afternoon of the third day. Our cargo was a full one of some 16,000 bushels. We delivered here all we received. We were short 75 bushels. The vessel with that load would not go through the Welland Canal. About 3,000 bushels would have to be taken out to let her through. She drew 11 feet 4 inches; the canal mark is 10 feet. We came down here to get unloaded. We unloaded at the Hatch Elevator. We arrived here the same evening we left Port Colbourne. We unloaded the next day. We began about 9 o'clock and were through and were un-
52 loaded by three o'clock in the afternoon. I took a receipt of the wheat the dated the day we unloaded, I think; it may have been I got the

receipt the next day. I have not got the log-book. I took receipt in my name subject to my order.

Q. Why did you take receipt in your name?

(Objected to; over'd; exception.)

A. I held the cargo subject to freight and charges on same by instructions of Mr. Worthington, the agent here.

(The telegram from Strong to the claimants is here introduced in evidence. It being conceded the same was sent and received the day of its date. It is marked A.)

Cross-examination.

I gave the original receipt to Worthington, endorsed by me; this is a copy of it, marked B. I went out of port at Buffalo on Sunday. I got the receipt Saturday. I think we unloaded the same day. I reported here only to Mr. Worthington. He told me to take the receipt subject to my order and hold it. This is all he said. I can't say certainly what day of the week I arrived at Port Colbourne; I had never been there with the convoy before; I had been there a good many times; I knew there were no facilities for unloading grain there except this one elevator.

Redirect.

Worthington said: Take a receipt subject to my order. He said
53 nothing about freight and charges.

Stephen C. Andrews recalled.

The counsel for the libellant here proposes to show the custom of the lake ports in reference to vessels waiting for a place to put cargo.

(Objected to, that the inquiry should be confined to Port Colbourne; over'd, and exception taken.)

I may not know the custom at all ports; I think I do, however. As far as I know the vessel waits 24 hours for the consignees to procure a place to unload, and then if no place is provided the master or owner gets a place; if not, then at the nearest point. I think this prevails all around the lakes. I never knew a port where it did not prevail. I have been in business some 10 years; was captain some 13 or 14 years; master on these lakes 5 years.

Cross-examined.

I never heard this custom disputed at Port Colbourne. There was a controversy among shipowners at this very time about the custom here at Buffalo; I did not hear what it was at Port Colbourne. I got *got* information at Port Colbourne that the custom was to wait till the turn came.

Redirect.

54 The controversy here was between myself and Mr. King about whether I could get demurrage on the cargo of the Torrent. I got my information at Port Colbourne from the elevator people.

Recross.

There was nothing else then to establish the custom except the elevator. I don't think I can tell a case where a vessel left a port. I think they have the right. I don't know of any other port so situated as Port Colbourne. It is not a custom to report to consignees. The Willand Railway Com-

pany declined to give other directions than to wait the turn, and declined to pay demurage.

Alexander McKindy recalled.

Our custom is to report to consignees, and he claims 24 hours to get a place. If he don't find a place the master claims demurage, and if consignee will not pay he finds a place and stores cargo and holds same subject to charges.

Cross-examined.

The custom prevails all about at the ports. I don't know whether it does at Port Colbourne, or at Sandusky, or at Erie, or Toledo. It does at Cleveland. I don't know whether it does at any Canadian port. It prevails at Buffalo.

55 *Redirect.*

I never made any claim on the cargo exept for freight and charges. I never made any claim against any one. I saw no one here except Mr. Worthington. I made no claim on the claimants at Oswego.

The libellant here rested the case.

Richard A. Townsend called for claimants:

I was clerk in Welland Railway office at Port Colbourne. I was connected with the elevator. The schooner Convoy was there last year; I can't say when she left. It was on or before the 30th August. There was an unusual number of vessels in the port the last of August, and I do not know when she was reported; it was my business to keep a memorandum in that respect. This memorandum was made by me. It was the 29th she reported. (Mem. marked C.)

Cross-examined.

Certain vessels named in the memorandum had left after reporting. I think this was correctly dated. I have no recollection aside from the telegraph. It was the custom to telegraph as soon as the vessel arrived.

56 We had to get money to pay freight. I do not remember how long the Convoy waited. Can't say I saw her. There was no book kept of arrivals; they were entered as the captains presented their bills of lading. I usually asked where the vessel was.

James Q. Hall.

I live in Port Colbourne. I was there in August and September last. I superintended the working of the elevator. I discharged the vessels in the order they reported as far as I know. I should say it was busy times last of August. We discharged them as fast as we could. We never had any more facilities than we had then. Some went away and come back. The Lansing did. I run the elevator as fast as we could; I can't say whether we run more than usual. We worked all the while. We did not often stop nights if there was a vessel to be unloaded.

Cross-examined.

I dont think I ever gave a vessel precedence.

Joseph Kelly.

Reside at Port Dalhousie. I am shipping clerk and sup't railroad.

57 We shipped as fast in Aug., 1861, as capacity would warrant and the supply of vessels would allow.

Thomas H. Travers.

I reside at Port Colbourne. I was sup't of the railway. If the Convoy had staid there she would have been unloaded about the 4th Sept. The road was in good working order and had its usual supply. The utmost capacity of the elevator is 100,000 bushels; the capacity of the road was about 2,500 bushels. We have carried 56,000 in one day. We don't always have such a fleet there. This was an unusual fleet.

Cross-examined.

We can transfer 45,000 bushels in 24 hours; if we had had plenty of cars, we could have done this at this time. We did not always run extra trains. When we carried 45,000 bushels we run extra trains. There were some days when there were not vessels at Port Dalhouse to take grain.

Redirect.

We had cars enough there to do ~~cter~~ ordinary business of the road.

Edwin Allen.

I came up on the receipt of the telegraph from Mr. Strong. I saw
58 Mr. Strong. I offered to pay him freight and 50 or 100 dollars in addition. He declined to take it. I insisted that he had no right to deliver the property at Buffalo. I did this at request of claimants.

Cross-examination.

I made no tender. His figures was $300 over freight, which was to cover extra freight and demurage, &c. He claimed more, but would take $300. He said the captain had sent him the receipt but it had passed him on the way.

The evidence was here closed.

EXHIBIT A.—By telegraph.

DATED SEPT. 1, 1860.

To Carrington & Preston :

Obliged to store cargo. Convoy in the Hatch Elevator in this city. Shall libel cargo for freight demurage at Port Colbourne and freights, and charges here unless settled immediately. Answer.

(Signature) H. N. STRONG, *Owner Convoy.*

59 EXHIBIT C.—By telegraph.

AUGUST 30th, 1860.

To C. Clarke :

D'R SIR : Fame almost out. Autocrat, Dickinson, Allegany, Jeressa, Lansing, Dacotah, Fanny, Gardner, Joseph Grant, Oriskany, Oreole Murray, The Imperial, Eagle Wing, Cairo, Convoy, and Torrent have all left for Buffalo.

B. H. T.

EXHIBIT B.

HATCH ELEVATOR, *Buffalo, Sept.* 1, 1860.

Received in store, from schooner Convoy, 15,921 and 20 bushels of wheat

for ac't of Alex. McKimly, master, subject to order and our charges. Damages by fire and loss of weight by heating at the risk of the owner.

FREDERICK PFOZEMIER, *Foreman.*

15,921 20 bushels.
Not transferable.
Elevating 43 40; shoveling 20 05.

60 At a special session of the district court of the United States for the northern district of New York, held at the city of Buffalo, on the 12th day of March, 1862.

Present: Hon. Nathan K. Hall, district judge.

HEMAN NORTON STRONG
v.
A CERTAIN QUANTITY OF WHEAT, TO WIT, 15,921 BUSHELS AND 20 pounds of wheat, late the cargo of the schooner Convoy, in the Hatch Elevator, so called, in the city of Buffalo, and Frederick T. Carrington and William J. Preston, claimants.

This cause having been heretofore brought to a final hearing upon pleadings and proofs, and the same having been argued by Mr. Hibbard for the libellant, and Mr. Ganson for the claimants, and due deliberation thereon had, it is, on motion of Mr. Ganson on behalf of the claimants, ordered, adjudged, and decreed, and this court by virtue of the power and authority therein vested doth order, adjudge, and decree, that the libel filed in this case be, and the same hereby is, dismissed, and that the claimants recover against the libellant their costs in this suit to be taxed.

61 Circuit court of the United States, northern district of New York.

HEMAN NORTON STRONG, appellant,
v.
FREDERICK T. CARRINGTON AND WILLIAM J. PRESTON, claimants of a certain quantity of wheat, to wit, 15,921 and 20-60 bushels of wheat, late cargo of the schooner Convoy, &c., appellees.

To the circuit court of the United States for the northern district of New York:

The petition of appeal of the above-named Heman Norton Strong respectfully shows that a decree was lately made in the district court of the United States in and for said district, bearing date the 12th day of March, 1862, in a certain cause of admiralty and maritime jurisdiction pending in the said court, wherein the above-named Heman Norton Strong was libellant, and the above-named Carrington and Preston were claimants of a certain
62 quantity of wheat, to wit, 15,921 20-60 bushels of wheat, late the cargo of the schooner Convoy, &c., and respondents, in and by which said decree it was ordered, adjudged, and decreed that the libel in said cause should be dismissed with costs, which said decree of the said district court is, as this appellant is inlused, erroneous and ought to be reversed.

Wherefore this appellant respectfully prays that the said decree may be reversed, and that such other decree may be made by this court as shall be agreeable to equity and good conscience, and this appellant may be restored to all things which he has lost by said decree. And this appellant as in duty bound will ever pray.

Dated this 19th day of April, 1862.

GEO. B. HIBBARD, *Proctor for Appellant.*

Appeal allowed April 21, 1862.

N. K. HALL, *U. S. District Judge.*

63 United States of America, northern district of New York, to Frederick T. Carrington and William J. Preston, greeting:

You are hereby cited to be and appear at a circuit court of the United States to be held at the city of Albany, in and for the northern district of New York, on the 20th day of May, 1862, pursuant to an appeal from a decree of the district court of the United States for the said district, wherein Heman Norton Strong is appellant, and the said decree having been rendered on the 12th day of March, 1862, in a cause wherein said Strong was libellant, against a certain quantity of wheat, to wit: 15, 921 20-60 bushels of wheat, late cargo of schooner Convoy, &c., in which you were claimants and respondents, and you are appellees, to show cause, if any there be, why the said decree should not be cancelled and speedy justice be done to the parties in that behalf.

Witness the Honorable Nathan K. Hall, district judge of the United States for the said district, this 21st day of April, 1862.

N. K. HALL, *U. S. District Judge.*

64 *Index.*

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District court of the United States for the northern district of New York.

I, George Gorham, clerk of the said court, do hereby certify the foregoing to be a transcript of the records of the district court in the cause named at the beginning thereof, made up pursuant to the rule of the Supreme Court of the United States.

In testimony whereof, I have hereunto signed my name and affixed the seal of the said district court the 21st day of April, 1862.

(Signed) GEORGE GORHAM, *Clerk.*

65 At a stated term of the circuit court of the United States of America for the northern district of New York, in the second circuit, held at the city of Albany, on Thursday, the 23d day of October, in the year of our Lord one thousand eight hundred and sixty-two.

Present: The Honorable Samuel Nelson, judge.

HEMAN NORTON STRONG, appellant, *v.* A CERTAIN QUANTITY OF WHEAT, BEING THE CARGO OF THE schooner Convoy, Frederick T. Carrington, and William J. Preston, claimants and appellants.	In admiralty.

The appeal in this case having heretofore been argued by the advocates of the respective parties, and due deliberation having now been had thereon, it is now here, on motion of Mr. J. Ganson, proctor for appellees, ordered adjudged, and decreed that the decree of the district court below be, and the same is hereby, affirmed, with costs.

66 United States circuit court for the northern district of New York, in admiralty.

H. NORTON STRONG, appellant,
v.
FREDERICK T. CARRINGTON AND WILLIAM J. PRESTON, claimants and appellees.

Proctor's fee in the district court	$20 00
Taking affidavit to claim	25
4 acknowledgments to bond	1 00
4 affidavits of justification &c	1 00
Postages paid	1 21
Clerk administering oaths to your witnesses	40
Four witnesses attending 2 days each	12 00
3 witnesses traveling 48 miles each	7 20
Taking affidavit of same	12½
Copy opinion of Judge Hall	5 37
Copy of Apostles	12 00
Postage in circuit	1 42
Telegraph	1 57
67 Proctor's fee in circuit court	20 00
Calendar fee	1 00
Copy of opinion and decree	2 00
Entering final decree, &c	1 50
Stipulated ab	88 04

Oct. 27, '62. GEO. B. HIBBARD.

Amount bro't down	88 04
Add fees clerk circuit making enrolled decree and papers 114, and enroll 6 f., being 120f., at 15c	18 00
	106 04

Oct. 28, 1862, taxed at one hundred and six 4-100 dollars.
A. A. BOYCE, *Clerk.*

68 Circuit court of the United States in and for the northern district of New York.

Be it remembered that the transmiss of pleadings and proceedings herein from the district court, containing all the papers annexed, was sent here on appeal and filed on the 24th April, 1862. The same was argued by advocates of each party before Judge Nelson at Canandaigua, on the 19th June, 1862. After due deliberation had, the said appeal was decided, and a decretal order made and entered herein on this 23d day of October, A. D. 1862. That the said decree of the district court dismissing the libel having thus been affirmed by this court with costs, the same are now here taxed at $106 04-100, and duly annexed hereto.

Whereupon the said pleading and proceedings and proofs, with said decretal order and taxed costs, are now here attached together and annexed hereto, and this final decree is now here duly enrolled and signed this 27th day of October, 1862, and the same is docketed for the sum of one hundred and six dollars and four cents, and execution is prayed therefor.

A. A. BOYCE, *Clerk.*

Filed 10th February, 1864.

SUPREME COURT OF THE UNITED STATES.

No. 137.

HEMAN NORTON STRONG, APPELLANT,

vs.

A CERTAIN QUANTITY OF WHEAT, LATE THE CARGO OF THE SCHOONER "CONVOY," FREDERICK T. CARRINGTON AND WILLIAM J. PRESTON, CLAIMANTS;

RESPONDENT.

BRIEF ON THE PART OF THE RESPONDENT.

JOHN GANSON,

ADVOCATE FOR RESPONDENT.

SUPREME COURT OF THE UNITED STATES.

No. 137.

HEMAN NORTON STRONG, APPELLANT,

vs.

A CERTAIN QUANTITY OF WHEAT, LATE THE CARGO OF THE SCHOONER "CONVOY," FREDERICK T. CARRINGTON AND WILLIAM J. PRESTON, CLAIMANTS AND RESPONDENTS.

BRIEF ON THE PART OF THE RESPONDENTS.

JOHN GANSON FOR RESPONDENTS.

STATEMENT OF THE CASE.

This is an action to enforce a lien against the cargo of the schooner Convoy, for freight, damages, in the nature of demurrage, and insurance.

The cargo was shipped on board of the schooner at Chicago, and the master executed a bill of lading in the following form :

CHICAGO, *Aug.* 18*th*, 1860.

Shipped in good order and condition, by E. G. Wolcott, on board of the schooner Convoy, of , whereof is master, the following articles, marked and numbered as in the margin, to be delivered in like good order and condition (the dangers of navigation only excepted) unto consignee, as per margin, or to his assigns. *Freight and charges to be paid as noted below, upon the actual and complete delivery of the said goods and freight to said consignee, or their assigns.*

1

In witness whereof, the master of said vessel hath affirmed unto three bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void.

Ac. J. H. Burch, care Carrington & Preston, Oswego, N. Y. 16,014 35-60 bushels No. 1 spring wheat, (16,014 35-60) via. Welland Railway from Port Colborne to Port Dalhousie, thence by sail or

steam vessel to Oswego. Freight to Port Colborne eight and one-half cents per bushel.

2 ALEXANDER McKINBY, Fol. 39½, p. 12 and 13.

The memorandum signed—

"Walker, Brothers, Ag'ts," at folio 40, should come in at folio 41, after the words "steam vessel."

The schooner arrived at Port Colborne on the 29th day of August, 1860, and the master reported the arrival of the schooner at the office of the Welland Railway company, at Port Colborne, and informed the agents, having charge of the railway and the elevator, that he was ready to discharge his cargo. There were then twelve or thirteen vessels in the port with cargoes to discharge, which had
3 arrived before the Convoy, and the agents replied that they would discharge the Convoy's cargo in its turn, according to the arrival of the several vessels in port when she arrived. The master made a similar application on the morning of the 30th of August, and received a similar answer as on the morning previous. The Convoy left Port Colborne on the 30th of August, for the port of Buffalo.

The Convoy, on the 31st of August, discharged its cargo at Buffalo, and the master stored it at the Hatch elevator. The master
4 took a receipt for its delivery ~~in~~ his order, dated the 1st of September, 1860, and on the next day, which was Sunday, sailed for Chicago.

On the 1st day of September the libellant, as owner of the Convoy, telegraphed to the claimants, at Oswego, as follows: (Fol. 58½, p. 19.)

"By telegraph. BUFFALO, Sept. 1st, 1860.

"To CARRINGTON & PRESTON:

"Obliged to store cargo Convoy in the Hatch Elevator, "in this city; shall libel cargo for freight demurrage at Port Col- "borne and freights and charges here, unless settled immediately. "Answer.

"H. N. STRONG, *Owner Convoy.*"

This is the first information sent to the consignees relative
5 to the cargo. There was a telegraphic communication between Port Colborne and Oswego, but no despatch was sent from there to the consignees at Oswego. On Monday the 3d of September, 1860, the consignees sent their attorney from Oswego to Buffalo, to see about the cargo. On his arrival there, the agent of the consignees saw Mr. Strong, and claimed he had not any right to bring the cargo to Buffalo, and store it there, but to settle the affair, he offered to pay to Mr. Strong the freight, and fifty or one hun-
6 dred dollars in addition. Mr. Strong declined to receive it, but insisted upon the freight, and three hundred and odd dollars in addition. (Fol. 58, p. 19, Edwin Allen's testimony.)

On the 5th day of September, 1860, the libel in this action was filed, and the claimants gave the ordinary stipulation under the Act

of Congress, which was approved by the District Judge, and delivered it to the Marshal. The libellant still retained the order, and the claimants were obliged to replevy their wheat in the State Courts.

The claimants proved that the Convoy would, if she had remained at Port Colborne, have been unladened on the 4th day of
7 September, 1860, in her regular order, and that the railway company did everything in their power to dispatch business, and discharged cargoes as fast as the capacity of their elevator and road would permit. That, at this time, an unusual number of vessels had arrived, and there was an unusual amount of grain to be handled on the road and at the elevator. (Fol. 57.)

There were not any other facilities for unloading vessels at Port Colborne than this elevator, nor any other place of storage, and Buffalo was the nearest port.

8 The libellant introduced, under objection, some evidence relating to the terms of shipment. The claimants objected to all parol evidence tending to vary or contradict the bill of lading.

The amount of the claim made in the libel is as follows. (Fol. 27½, article 8th):

Freight money to Port Colborne	$1,353 30
Demurrage and detention	150 00
Freight from Port Colborne to Buffalo	175 00
	$1,678 30

The libel then alleges that the aggregate amount of claims and demands made in the libel for elevating the cargo, for storage, commissions and insurance, "*will not exceed* $1,000." (Fol. 27⅞, Article 8th, page 8)

POINTS.

9 First.—The amount sought to be recovered, as stated in the libel, is not sufficient to confer jurisdiction on this Court, to entertain this appeal.

To confer jurisdiction in this instance the allegations of the libel must *show affirmatively* that the amount for which a recovery is claimed, *exceeds two thousand dollars*. That it *may* exceed that amount is not sufficient to give the Court jurisdiction.

17 How. 19 Olney vs. The Steamship Falcon.
17 How. 17 Udall vs. Steamship Ohio.
24 How. 207 Sampson vs. Welsh.
1 Wall. 337, Lee vs. Watson.

"The aggregate amount of claims and demands for elevating, storage, commissions and insurance," *may*
10 not reach two *hundred* dollars; hence it does not appear that the amount in dispute will reach the requisite sum to bring the case within jurisdiction of the Court. The appeal should, therefore, be dismissed. But if this point is overruled, then the respondents contend that

the decree of the Circuit Court should be affirmed for the following reasons:

FIRST.—The bill of lading was signed by the master of the vessel and cannot be varied or contradicted by oral evidence in those respects where it operates as a contract between the parties;
11 those parts of the bill of lading which operate as *receipts*, or as *statements* of the conditions of the property shipped, only, are open to explanations by oral evidence.

5 Seld. 529 Ellis vs Willard.
25 Barb. 16, White vs Van Kirk.
2 Kernan 561, Renard vs Sampson.
4 Seld. 403, Coon vs Knap.

It is a contract, as to the route to be taken, and the place of delivery, and the person to whom the delivery is to be made, and the amount of freight to be paid.

3 Sand 7, 12, Wolfe vs Myers.
1 Blatch. C. C. R. 360. The Eli Whitney.

12 The oral evidence given does not tend, if admissible, to vary that portion of the bill of lading which specifies when and where the freight and charges were to be paid so that the bill of lading in *that respect* must, in any event, prevail.

The evidence does not show any *agreement* made by the parties different from that specified in the bill of lading, nor any mistake in reducing it to writing. An *intent* not expressed is not admissible to reform a contract.

20 How. Prac. R., 151, Smith vs. Howard.

The libellant does not make out a case for reformation
13 of the contract of affreightment, and this Court has not any jurisdiction to afford such relief.

The agent of the vessel took the bill as it now is, and procured the master's signature, and delivered it himself to the claimants. (Fol. 42.) The rights of the parties must be determined on the bill of lading as it now is.

20 Monthly Law Reporter, p. 501.

SECOND.—The libellant is not, by the bill of lading, entitled to his freight and charges until the "actual and complete delivery
14 of the cargo to the consignees or their assigns." The only consignees named in the bill of lading are the claimants at Oswego.

The contract of the carrier must be performed before he is entitled to his freight; that is, in this case, there must be an *actual* and *complete delivery* of the cargo"

to the consignees at Oswego before the freight is payable.

1 Bosworth, 177, Clark vs. Masters.
2 Bosworth, 195, Atlantic and Mutual Insurance Companies vs. Bird & Neilson.
3 John., 154, Dunnett vs. Tomhagen.
4 Mass, 91, Lane vs. Penniman.
7 Term. R., 377, Cook vs. Jennings.
10 East, 378, Hunter vs. Prinsep.

15 The transportation and delivery are conditions precedent to the right to demand the payment of freight, and unless the condition is performed or waived, the party is not entitled to his pay.

17 N. Y. R., 178, 185, Smith vs. Brady.
1 Blatch. C. C. R., 354. Miston vs. Lord.
1 Blatch. C. C. R, 358, The Richardson (note).
Same case, Abbott ad. R., 499.

The freight is generally payable only on the arrival of the goods at the port of final destination, where they are received by the consignee.

The presumption is, if there should be any doubt as
16 to the time and place of payment of the freight, that it is not to be paid till the goods reach the ultimate consignee.

1 Manning & Granger 407, Crozier vs Smith.
Also to be found in 39 English. Common Law Reports, 504.

Read the opinion of the Judges, particularly Maule's. There is not any waiver in this case, of the performance of the contract of affreightment, or consent to receive the cargo, short of the place of destination. The rights of the parties, therefore, must be determined by the express contract entered into by them.

17 THIRD.—The libellant, if his right to demand the payment of his freight at Port Colborne had been secured by the contract, was not justified ~~by~~ bringing the cargo to Buffalo and putting it in store there. In that event the evidence in the case does not entitle the libellant to his freight. There is not any proper excuse shown for not delivering the property at Port Colborne, nor would the acts done there entitle the libellant to the payment of his freight.

The libellant had agreed that the cargo should go from Chicago to Oswego "via the Welland Railway from Port Colborne to Port Dalhousie," and the master knew when he signed the bill of lading, the nature of

18 that port, and what the facilities there were for transhipment. The libellant was bound by his contract to have the cargo go that way. He therefore took the risks of the ability of the Railway Company to transport the property, and of any delay there might be in its transhipment at Port Colborne, and carriage hence, and agreed to defer the payment of his share of the freight, till the property reached its destination, and till its delivery there, to the consignees, "was actual and complete."

19 The Railway Company never refused to receive the property, but it, whenever applied to, consented to receive it as soon as possible. It simply requested the libellant's captain to "wait his turn," and promised to unload his vessel in its order, according to its arrival, in compliance with the custom of that port, known to the captain to exist, when he took this cargo aboard and agreed to transport it by that route.

The railway company did everything in its power to facilitate and expedite the discharging of the cargoes which were there, prior to the arrival of the Convoy.

20 The delay was not such as to render it guilty of any negligence, or liable for the detention.

2 Kernan, 245, Wibert vs. The New York York & Erie Railway Company.

The rule prevailing, in cases where the property has reached the place of its *final* destination, has not any application to this case, which relates to an intermediate place of transhipment. Where property has reached the place of final destination, and the consignee is dead, absent, or refuses to receive it, or is not known, and cannot, *after reasonable efforts, be found*, the carrier, to discharge himself from further liability,

21 may place the goods in store with some responsible third person in that business, *at that place, for and on account of the owner;* in which case, the warehouseman becomes the bailee of the owner.

1 Denio, 45 Fish vs Newton.

But where a carrier has taken property to transport, and has only agreed to see it delivered to an intermediate carrier, and agrees to wait for the payment of his freight till the property is delivered at its place of ultimate destination, would not have any right, if there was *delay*, simply on the part of the intermediate car-

22 rier to receive the property on account of an over accumulation of goods to be carried, to take the property off such route and deposit it in a warehouse thirty miles distant, to his own order, and then libel the cargo for freight as *earned* and *payable*.

In such case it would be his duty to retain the prop-

erty till the intermediate carrier could receive it, if such carrier was willing to receive the property in the ordinary course of business.

23 The carrier should at least call upon the shipper or consignee for instructions, if the delay was to be such as he was unwilling to submit to, before he assumed to deviate, not only from the route but from the terms of his contract. In this instance there was a telegraphic communication with the residence of the consignees, but no advice was sent them.

In fact no advice was sent to them until after the cargo was taken to Buffalo and put in store. The communication then made, was by telegraph, not asking for instructions, but informing the consignees that their property would be libelled unless they settled "freight demurrage at Port Colborne, and freight and charges at Buffalo immediately."

24 The consignees denied the right of the carrier to bring the cargo to Buffalo, but by way of compromise, offered to pay the freight to Port Colborne, and fifty or one hundred dollars in addition, which the libellant declined to accept. (Fol. 58.)

FOURTH.—The libellant had not any right to bring the cargo and store it in Buffalo, under the circumstances disclosed in this case. If the property could not have been stored at Port Colborne, a communication, should have been sent to the shipper or consignees, and instructions should have been asked.

25 The right to put the property in store, is confined to the port of final destination, in case the consignee can not be found, or refuses to receive the property, and when stored it must be in *that place*.

1 Denio 45, Fisk vs. Newton.

The storage, when permitted, must be *for the account of the owner*, subject to the payment of freight, so that the owner can procure his property on payment.

1 Denio, 45, Fisk vs. Newton.

FIFTH.—The libellant is not entitled to demurrage, as such, without a stipulation therefor, in the contract of affreightment.

3 John., 342, Robertson vs. Bethune.

26 2 Camp., 483, &c., Rogers vs. Forresters.

2 Camp., 488, Burmester vs. Hodgson.

An action on the case may be maintained to recover *damages* arising from an *unreasonable* detention of a vessel at the port of delivery; such damages would not be a

lien on the cargo. They do not flow from the breach of the contract of affreightment.

The evidence in this case does not show any unreasonable delay at Port Colborne. The vessel would have been unloaded according to the custom and well known facilities of the port.

The railway company offered to unload her.

17 Barbour, 184, Sprague vs. West, 548 Abbott's Rep.

27 2 Camp., 483, 488, above cited.

SIXTH.—If the libellant is entitled to payment of the freight to Port Colborne, but not to damages, by way of demurrage, as a condition to a complete delivery of the cargo, then his refusal to receive the amount offered by Mr. Allen and to deliver the cargo, was a conversion of the cargo, which forfeited his lien.

5 Hurls & Norman, 931, Herford vs. Mendel.

The consignee of goods under a bill of lading not containing any stipulation for demurrage, is not liable to pay demurrage even on an implied contract.

28 4 Ellis & Blackburn, 945, Smith vs. Sieveking.

Same case, 82 English Common Law, 944.

The decree should be affirmed with costs.

JOHN GANSON,

Advocate for Respondents.

District Court of the United States for the Northern District of New York, In Admiralty.

HEMAN NORTON STRONG,
vs.
A CERTAIN QUANTITY OF WHEAT, BEING the cargo of the schooner "Convoy," and Frederick T. Carrington and William J. Preston, claimants.

Opinion of the District Court.

HALL, District Judge.

The libel in this case was filed to compel the payment of freight on the cargo proceeded against, from Chicago to Port Colborne
29 and thence to Buffalo, demurrage for two days detention at Port Colborne, and sundry expenses incurred by the unlading, storing and insurance of the cargo at Buffalo.

The bills of lading for the cargo were in the following form:

CHICAGO, Aug. 18, 1860.

Shipped in good order and condition, by E. G. Walcott, on board the schooner Convoy of whereof is master, the following articles, marked and numbered as in the margin, to be delivered in like good order and condition (the dangers of navigation only excepted,) unto consignees, as per margin, or to his or their assigns, freight and charges to be paid as noted below upon the actual and complete delivery of said goods and freight to said consignees or their assigns.

In witness whereof the master of said vessel hath affirmed unto three bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void.

J. H. Burch & Co., care Carrington & Preston, Oswego, N. Y., 16,014 35-60 bushels No. 1 spring wheat, (16,014 35-60) via. Welland Railway from Port Colborne to Port Dalhousie, thence by sail or steam vessel to Oswego. Freight to Port Colborne eight and a half cents per bushel.

The bill of lading copied above was signed by E. G. Wolcott as agent of the shippers, and three other copies were signed by the master of the Convoy. The copy of the bill of lading annexed to the answer of the claimants is in substance the same, except that the name of "Alex. McKindy," as master, is inserted in the body of the bill; that the name of "Alex. McKindy" is signed at the bottom, and that under that signature is the following entry:

"Freight from Port Colborne to Oswego four and one-half (4½) cents per bushel, to be shipped from Dalhousie by steam or sail vessel, classing not below standard, dangers of navigation excepted.

"For Welland Railway.

"WALKER & BROTHER, *Agents.*"

There is, however, no proof in regard to this entry, and it does not appear that the agent or master of the "Convoy" knew, at the time of the execution of the bills of lading, that any special contract had been made for the transportation of the cargo of the Convoy over the Welland Railway.

It must therefore be assumed that their knowledge of the final destination of the cargo and the mode of its transportation from Port Colborne, and via Welland Railway to Oswego, was wholly derived from the entries in the bill of lading so signed by the agent of the shipper, and similar bills of lading signed by the master of the Convoy.

The Convoy, with her cargo on board, reached the western terminus of the Welland Railway at Port Colborne, on Lake Erie, on the 28th day of August, 1860, between nine and ten o'clock in the evening. The next morning her arrival was reported to the agents of the Welland Railway Company, and during that day and the next the

34 master of the schooner and the agent of her owner several times desired the agents of the company to discharge the vessel, or to fix some specific time for her discharge. The agents of the Railway company declined to do either, stating that they could discharge vessels in the order of their arrival only, and that the Convoy should be discharged in her turn, as soon as the other vessels which had arrived before she reached the port, and were there awaiting their turn, could be discharged. There was an unusual and extraordinary press of business at the Welland Railway Com-
35 pany's Elevator at Port Colborne, and though vessels were discharged as rapidly as the capacity of the elevator and railway would permit, there was, at that time, an accumulation of vessels and consequent delay in their discharge. There was no other elevator or place of storage at Port Colborne, and if the Convoy was discharged there, she would necessarily be discharged at the Elevator of the Railway Company or by hand labor. If discharged by hand labor there was no means of storing the cargo there, and it would have been exposed to injury and loss.

When the Convoy arrived, there were twelve or thirteen
36 vessels waiting to be discharged, and, as two vessels were usually discharged in each twenty-four hours, the Convoy, if she had been discharged in turn, would have been discharged on the sixth or seventh day after her arrival, or about the fourth day of September.

There was no agent of the consignee at Port Colborne, but there was a telegraphic communication between Port Colborne and Oswego, where the consignees resided. No instructions were asked of the consignees, and no information was sent there by the master of the Convoy, who with his vessel, remained at Port Colborne until
37 the afternoon of the 30th of August, when he sailed for Buffalo, the nearest port at which storage for the wheat could be obtained. He reached Buffalo the same evening, and the next day he discharged his cargo at an elevator, taking a receipt for the wheat, to be delivered to his order. The day after the cargo was discharged, the libellant, as owner of the Convoy, sent a telegraph from Buffalo to the consignees at Oswego, in the following terms:

"BUFFALO, Sept. 1st.

"To CARRINGTON & PRESTON:

"Obliged to store cargo Convoy in the Hatch Elevator,
38 in this city; shall libel cargo for freight demurrage at Port Colborne, and freight and charges here, unless settled immediately.

"Answer.

"H. N. STRONG, *Owner Convoy.*"

On the receipt of this telegram the claimants dispatched an agent to Buffalo, who offered to pay freight to Port Colborne, and fifty to one hundred dollars in addition, but the libellant claimed $300 besides the freight provided for in the bill of lading. No settlement was made, and on the 5th of Sept., 1860, the libel in this case was filed.

On the hearing it was insisted, on behalf of the libellants, that the Convoy was chartered for the trip from Chicago to Port
39 Colborne, to carry the wheat which constituted her cargo; that the bill of lading subsequently executed was therefore to be regarded only as a mere receipt for the wheat; that the charter party and not the bill of lading was to be looked to as containing the contract of affreightment between the parties; that by the terms of the charter party and not by the bill of lading, the rights of the parties were to be determined; and that if there was anything in the bill of lading to prevent the recovery of freight immedi-
40 ately on delivery of the cargo at Port Colborne, or relieving the owners of the cargo from the duty of receiving it there on the vessel's arrival, the bill of lading should be reformed so as to make it correspond with the alleged charter party. The libellants also offered and gave (subject to the claimant's objections,) proof of the customs of the lake ports in respect to the disposition to be made of freight, when the consignee does not provide for its reception within twenty-four hours after its arrival is reported, which evidence will be hereafter more particularly detailed.

41 The allegations of the libel so far as they relate to the alleged charter of the Convoy, are in substance, that on the 18th day of August, 1860, E. G. Wolcott, the agent of the owners of this cargo, shipped, and the master and owner of the Convoy received on board that vessel the wheat before mentioned, which the shipper agreed should be carried, and which the said schooner, master and owner agreed said schooner would carry, from Chicago aforesaid to Port Colborne in Canada, for the freight mentioned in a bill of lading, which was on said last mentioned day, duly executed and
42 delivered in triplicate; that it was agreed that the said cargo should, pursuant to said bill of lading and contract, be carried to, and delivered at, Port Colborne, and that all the parties to such bill of lading and contract of affreightment (except said schooner, master and owner) agreed that they would receive the said cargo from said schooner on her arrival at said Port Colborne, and would then and there relieve the said schooner therefrom, and pay the freight thereon from Chicogo to Port Colborne aforesaid. That the said schooner, master and owner thereof, did not, nor did any
43 or either of them, ever in fact agree to carry said property from said Chicago to any other place than said Port Colborne, but did agree to carry the said wheat from said Chicago to said Port Colborne, and there deliver the same (as the same as aforesaid was agreed to be received) to be carried from thence as is in said bill of lading mentioned. That if the said bill of lading expresses any other or different agreement the same is so expressed by mistake, and the said libellants pray that the same may be reformed and
44 and altered to conform to the contract of affreightment as aforesaid made.

The only evidence to sustain the allegation that there was a contract of charter prior to, and independent of, the contract evidenced by the bill of lading, is to be found in the deposition of Mr. Goodnow, the agent of the libellant, and the deposition of Mr. Wolcott, the agent of the claimants, by and between whom the arrangement for

the carriage of the wheat was made. The agent of the libellant says: "On or about the 18th day of August, A. D., 1860, I, as agent
45 of H. N. Strong, chartered the schooner Convoy, which was then at the Port of Chicago, to Mr. E. G. Wolcott, a commission merchant, on South Water street Chicago, Illinois, to carry a cargo of wheat from Chicago to Port Colborne in Canada, at eight and one-half cents per bushel freight. This is the cargo now in controversy in this suit. At the time of making said contract or charter, no other destination or port was named but Port Colborne. Mr. Wolcott made out some bills of lading for me, leaving the
46 number of bushels of wheat blank, for the captain to sign, as she would not be loaded until after office hours. The captain signed the bills of lading and I took them to the office of Mr. Wolcott the next morning. The bills of lading signed by the captain were three in number. The fourth bill of lading annexed to the deposition as exhibit A, is signed by the shipper, E. G. Wolcott, and is an exact copy of the three bills of lading signed by the captain, with the exception of the names of the signers. At the time the
47 cargo was shipped, and the bills of lading were signed, there was no contract or any other understanding of whatever kind for the transportation of the cargo to Oswego, or any other port; it was only from Chicago to Port Colborne that said contract was made for.

The agent of the claimants says: "I contracted with Mr. Goodnow for the schooner Convoy, about the 18th of August, 1860, to take a cargo of wheat from Chicago to Port Colborne, and I think I made a contract with one of the Mr. Walker's to take it from there
48 through to Oswego. Walker was agent of the Welland Railway Company. My only conversation or understanding with Mr. Goodnow was in relation to Port Colborne only, and that was the contract made with Mr. Gooodnow from Chicago to Port Colborne."

There is nothing in this testimony or in the other testimony in the case, to justify this court in disregarding or modifying the contract evidenced by the bill of lading. There was probably a single agreement, that the vessel should take a cargo of wheat to Port Colborne, at 8½ cents per bushel, leaving the details to be determined
49 by the customs and usages of shippers, vessel owners and masters at Chicago, and looking to the execution of a bill of lading, as the final evidence of the terms of the contract; or it may be the bills of lading, which were prepared, with a blank for inserting the quantity of wheat after the cargo was put on board and the quantity ascertained, were prepared at the time of the first agreement as evidence of the contract agreed to by the agents of the parties. This should not control or effect the bill of lading in
50 this case. It is true that bills of lading signed by the master of a vessel under a charter party for the voyage, are often regarded as little more than evidence of the shipping and receipt of the cargo, and that the charter party is ordinarily the controling contract as to all the terms and provisions clearly expressed therein (1 Parsons Maritime Law, 240–241. But where a written charter party makes no provision in regard to the consignee or mode of delivery,

the bills of lading, which supply the omission, cannot be deemed inoperative and invalid, because of the pre-existing char-
51 ter party. If the cargo had been lost or damaged prior to its arrival at Port Colborne, the liability of the owner of the Convoy would not have been that of bailees to transport for hire under a charter party, who are only bound for the use of ordinary skill and care, but the greater and more stringent liability of ship-owners and carriers. The contract made by the agents of the parties was a contract for the carriage of the wheat, not the charter of the Convoy; and the bill of lading is therefore the proper
52 and controling evidence of the contract. The bill of lading shows that the Convoy was to carry the wheat only to Port Colborne; at least this is apparent when considered in connection with the proof that, if the wheat was transported to Oswego via the Welland Railway, it must necessarily leave the vessel at Port Colborne. The parties who made the contract knew this. They stipulated for the freight to Port Colborne only; they provided for a different mode of transportation beyond, and they knew that on the arrival of the vessel at Port Colborne, she would, in the
53 ordinary course, and according to the custom of that port, be unladen at the elevator of the Welland Railway Company. The master who signed the bill of lading had been at that port frequently, and knew that the wheat, if unladen there, and sent forward by the Welland Railway, must be delivered at that elevator, unless the tedious and expensive process of unloading by hand was adopted. Doubtless both parties expected and intended the vessel should be discharged at the elevator. The shipper did not expect that the cargo would be delayed by the slow process of
54 discharging the wheat by manual labor, and the ship-owner did not expect to incur the expense of manual labor for that purpose. Both parties expected that the vessel would be discharged by the Railway Company much sooner than she could be discharged by hand labor; and neither expected that any means of discharge or any place of storage would be provided other than that furnished by that company.

That company was one of the carriers on the line of transportation over which the wheat was intended to pass, (as appeared upon the face of the bills of lading signed by the master under the in-
55 spection of the agent of the Convoy) and both parties expected that the Railway Company would receive and transport the cargo of the Convoy over that road. They equally relied on the ability of the Railway Company to receive and forward the cargo without delay; and they doubtless were equally disappointed when it was found that in consequence of an unusual and extraordinary press of business at Port Colborne, several days must elapse after the arrival of the vessel, before she could be discharged.

The evidence shows that the Railway Company discharged
56 the vessels at Port Colborne in their turn according to the order of their arrival, and as rapidly as their means would allow; that the Convoy would have been discharged in her turn as soon as all other vessels waiting for their discharge at the time of her arrival had been discharged, and that she would have been so dis-

charged in from six to eight days after her arrival. She remained at Port Colborne two days and three nights, for which her owner now claims $150 demurrage, and then there being no means of stor-
57 ing her cargo at Port Colborne, she came to Buffalo and put it in store in this city.

In determining the rights of these parties in regard to the disposition of the cargo of the Convoy under the contract evidenced by the bills of lading, and the circumstances of this case, it is proper here to consider the proof of the custom of the lake ports, which it was insisted justified the course taken by the master of the Convoy. The libellants witnesses stated in substance that it was the custom at many of the lake ports, and so far as they knew, at all of
58 them, for the master of a vessel to report her arrival with freight, and to allow the consignees twenty-four hours to provide for delivery and receipt of the property consigned to them, and that, if the consignees were not at the end of that time prepared to receive the freight, the master of the vessel was entitled to store it, subject to charges, at the nearest point. It was not, however, stated by these witnesses that they could mention any case where a vessel had left the port of destination under such a custom. The
59 agent of the libellant admitted he could not do so, and that the information he had in regard to the custom at Port Colborne, was that it was there the custom for vessels to wait their turn to be discharged.

It is true that in the absence of express agreement, the duty of the master in the delivery of freight must necessarily be determined by the custom which regulates the mode of delivery at the port of discharge. In the absence of express contract, the parties are presumed to have contemplated a delivery according to the established custom. And proof of custom prevailing at most of the ports on the
60 great lakes, without any countervailing proof in respect to the other ports, might be sufficient proof of the custom at other ports on the lakes under similar circumstances.

If there was no reason for presuming the existence of a different custom, the general usages and customs of the lake ports, might, in the absence of all proof in respect to the particular port, be presumed to prevail there also; but in this case there is some proof of a different custom at Port Colborne—a custom to discharge vessels in the
61 order of their arrival. But Port Colborne, as a commercial port, is very different from the other lake ports, and the custom proved, which is reasonable and proper at other ports, is not likely to be adopted at that port. Considering the peculiar character of the port and of its business, and especially the fact that there are no facilities for discharging vessels or storing their cargoes, except such as are furnished by the Welland Railway Company, no custom except for vessels to wait their turn, can be considered as just or reasonable; and no other custom can, under the proofs in this
62 case, be considered as having been within the contemplation of the parties by whom the contract of affreightment in this case was made. The master of the Convoy and the agent of her owner knew, as well as the shipper and owner of the cargo, what means of discharging the vessel were to be found at Port Colborne,

and if, when the contract of affreightment was proposed, they were unwilling to take the danger of delay consequent upon this mode of discharging this vessel, they should have provided against it by stipulating for demurrage.

I am therefore of the opinion that the master of the Convoy
63 was bound to deliver his cargo to the Welland Railway Company, and to wait his turn for the unloading of his vessel. But if the master of the Convoy was not bound to remain at Port Colborne until his vessel could be discharged in its order, he did not do what he ought to have done before taking the cargo to Buffalo and there storing it. There was telegraphic communication between Port Colborne and Oswego, where the consignees of the wheat resided, and during the time he remained at Port Colborne information of the delay and its cause could have been sent to the
64 consignees and their instructions received in return. The consignees might have offered a fair demurrage, or have given special instructions for the disposition of the wheat. And it was the duty of the master to endeavor to communicate with the consignees when it was probable that their instructions could be readily obtained.

If, when a cargo reaches the port of destination, and the evidence of the consignee (who is presumed to know that his interests will require attention on its arrival,) the shipmaster, in the absence
65 of any particular custom, is bound to use due dilligence to find the consignee and obtain his instructions before he assumes to put the cargo in store, on the ground no other proper delivery can be made, it would seem to be more clearly his duty to use due diligence to obtain from the consignee his instructions in regard to the disposition of the cargo, where the difficulty in carrying out his contract of affreightment as originally contemplated, arises at an intermediate port, and where the consignee was not expected to be present either in person or by his agent.

The disposition of the cargo by the master requires at all
66 times the utmost caution on his part. He should always bear in mind that it is his duty to do all in his power to carry out, to the extent of his engagement, the prime object of his employment, the forwarding of his freight, by the route and means agreed upon, to its place of final destination.

It is for this purpose that he has been entrusted with it, and this purpose he is bound to endeavor to accomplish by every reasonable and practicable effort until he has delivered his freight according to his contract, or such delivery has been entirely impracticable.
67 Even at the port of final destination and the presumed residence of the consignee, he is bound to make every reasonable effort to deliver the cargo personally to the consignee, or in accordance with the known and established customs of the port, which customs are presumed, in the absence of express agreement, to be within the contemplation of the parties, and to be by their tacit consent silently introduced into the contract of affreightment. If he is required to do this at the port of final destination and the place
68 of business of the consignee, he can not be required to make less effort to perform his contract and protect the interests of

the absent owner in an unforseen emergency at an intermediate port, where the consignee was not expected to be present, but necessarily relied upon the acts of another carrier having exclusive control of the means of the carriage over a portion of the line of transportation.

Good faith, the interest of commerce and a wise public policy, equally require that the master should do all in his power to protect the interests of freighters in such unforseen and extraordi-
69 nary emergencies, and the master of the Convoy should not have diverted the wheat of the claimants from the line of transportation they had chosen, and have thereby subjected it to unusual and unexpected charges, and its owners to a claim for a breach of the contract with the Welland Railway Company, until he had consulted or attempted to communicate with the consignees.

It was contended on the argument, that under the bill of lading in this case, no freight could be demanded until the delivery of the wheat to the consignees at Oswego, the port of final destina-
70 tion; but in the view I have taken of this case, it does not become necessary to decide the question. It may possibly be doubted what would be the true construction of the bill of lading, independent of any custom; and also whether the custom for the different carriers along the same line of transportation to advance to each preceding carrier all accrued freight and charges, and receive the goods and merchandise subject to such charges, to be collected with their own charges on delivery to the next carrier or the consignee, has been so long and so well established, and so often
71 proven in court as to require me to take judicial notice of it, without proof in the particular case. In the present case it is probable that such custom was understood by the parties, and that they intended it should be acted upon; and that it was not intended or expected that the freight earned by the "Convoy" should either remain unpaid, or be advanced by the consignees until the wheat reached Oswego, all parties supposing it would be advanced by the Welland Railway Company, according to the known and established custom.

Independent of the custom and looking to the bill of lad-
72 ing alone, I am not prepared to say that the consignees were bound to pay freight before the wheat arrived at Oswego. Freight is usually payable when it has been fully earned by the safe carriage and right delivery of the cargo; and if the bill of lading had simply provided for the payment of the Convoy's freight on delivery, the delivery referred to would have been the delivery by her at Port Colborne. But such is not the provision in the bill of lading. The freight is declared to be payable "upon actual
73 and complete delivery of said goods and freight to said consignees or their assigns," and it is clear that the delivery to the consignees was to be at Oswego and not at Port Colborne.

What would have been the effect upon the rights of the parties of an absolute refusal on the part of the Welland Railway Company either to receive the wheat or advance the freight of the Convoy, it is not now necessary to decide, for they did neither, and only asked that the Convoy should wait her turn and be discharged in her order.

The libel is dismissed with costs.

74 March 17, 1862.

Circuit Court of the United States for the Northern District of New York.

HEMAN NORTON STRONG } Opinion of the Circuit Court.
vs.
F. T. CARRINGTON AND W. J. PRESTON, claimants of cargo of wheat. } Appeal in Admiralty, October 7th, 1862.

NELSON, C. J.:—The contract of the bill of lading provided for the shipment of the wheat from Chicago to Port Colborne, Canada, where, as is apparent from the face of the bill, as well as from the course of trade, it was to be received and forwarded to its des-
75 tination at Oswego. The shipment to Port Colborne is a distinct contract especially provided for, and on delivery of the cargo there the freight was earned. Although it is not distinctly shown in the proof, yet it is doubtless the fact that this freight is advanced to the master by the railroad, the succeeding carrier, and the whole of the freight paid by the consignee at Oswego, the port of destination. Indeed this may be inferred from the testimony of Townsend, the clerk of the railway office, who says it was the custom to telegraph as soon as vessels arrived. We had to get
76 money to pay freight.

The question in the case is as to the duty of the vessel in the discharging of the cargo at Port Colborne, the terminus of the voyage and place of delivery. Was she justified in carrying her freight to Buffalo? We think not. The course of the trade from Chicago to Oswego, or down the lakes via Welland Railroad, is well established and understood, and all parties concerned in the shipment must have known that on the arrival of the vessel at Port Colborne the
77 only means of discharge and receipt of the cargo by the carrier from thence by the W. R. R., was by the use of its elevators. The master had been frequently at this port and was familiar with its condition and course of business, and if he had not been, he would, in contemplation of law, have been chargeable with this knowledge. He therefore knew that the usage of the port, from the necessity of the case, was to discharge each vessel in its turn, and that he would be entitled to no preference over others, and if he was not willing to submit to the course of trade and usage of the
78 port, he should have declined accepting the shipment. By accepting and engaging to carry and deliver the cargo at the port he assumed that duty subject to all the existing embarassments and delays attending the trade which were common to all vessels engaged in it. This course of trade is too well established and fixed from the condition of the port and attendant facts, to admit of any change except where there is the most express proof to the contrary; —none such appears in the case. This is not the case of the
79 arrival of a vessel at her port of destination in the absence of the consignee or any agent to receive the cargo, or place to land it in security, which might well justify a withdrawal to the nearest port for relief. Here was agent and place ready to receive it in due course of the trade.

Decree below affirmed.

Supreme Court of the United States.

HEMAN NORTON STRONG,
Appellant.
vs.
A CERTAIN QUANTITY OF WHEAT,
Late the cargo of the Schooner Convoy, &c.

Brief and Argument on the part of the Appellant.

GEORGE B. HIBBARD, of Buffalo, N. Y., for Appellant.

I.

This Court has jurisdiction of this appeal, the amount claimed by the appellant being sufficient to give such jurisdiction.

The claims in the libel are as follows:

For freight, (fol. 27,)	$1,353 30
Demurrage and detention at Port Colborne, (fol. 27,)	150 00
Freight from Port Colborne, (fol. 27,)	175 00
Commissions and charges for commissions at Buffalo, (fol. 26,)	78 60
	$1,756 90

Interest is claimed on these amounts. (Fol. 27.) Interest would be calculated from the time of the arrival of the vessel at Buffalo, August 30, 1860, (fol. 23,) to the date of the decree in the Circuit Court, October 23, 1862. (Fols. 65, 68.)

Interest at the rate of seven per cent. (the New York rate of interest) on...	$1,756 90
for the time above specified, two years one month and twenty-three days, is, say,.....	263 00
	$2,019 90

(This is aside from the general claim (fol. 27) that the amount of claims besides freight, would "not exceed $1,000," and the general claim for insurance (fol. 26) for a sum "not exceeding $500.")

Under familiar rules therefore, the Court has jurisdiction of the case, and the amount of interest is rightly computed.

The U. S. *vs.* Daniels, 12 Peters, 32.
Knapp *vs.* Banks, 2 How., 73.
Udall *vs.* Steamship Ohio, 17 How., 17.

II.

There was a charter party in the case which may be by parol, and which controls.

1 Parsons on Mar. L., 229, 230, 240, 241.
Perkins *vs.* Hill, 2 Wood & Minot, 158.
Lamb *vs.* Parkman, Sprague's Decis., 343.

The parties to the charter party made the contract, not acting through the master. The master signed the bill of lading, which under the authorities was a mere memorandum. Walker & Bros. were the agents of the Railway Company.

III.

The bill of lading will be disregarded and amended according to the actual contract made between the parties, irrespective of the question whether the contract was a charter party.

2 Parsons on Mar. L., 649, 650, 651.
The Hiram, 1 Wheat., 440.
2 Parsons on Mar. L., 650.

The libel expressly asks this relief. (Fols. 20, 21, 28.)

1. The contract was that the wheat should be carried from Chicago to Port Colborne, and that there the freight should be paid. This is apparent, for:

1. The testimony of the agents of both parties at Chicago, is that the contract was only to carry and deliver at Port Colborne.

2. The vessel would not go through the Welland Canal. (Fol. 51.)

3. That part of the bill of lading which shows that the property was to be delivered at Port Colborne, and specifies as to payment of freight there, is signed by the master. The remainder of the bill, containing all respecting the carriage beyond Oswego, is signed by the agent of the Railway Company. (Fol. 40.) The agent of the owner swears that the word *via* in the bill of lading meant the same as *care of*. These and the other facts that the bill of lading provides for the carriage of the property beyond Port Colborne by rail, show conclusively that it was the intent of the parties, that the property should be only carried to Port Colborne and there delivered.

4. This being so, and as the performance of the contract on the part of the libellant terminated at Port Colborne, it follows that the freight was to be paid on the delivery there.

The Railway Company were the consignees at Port Colborne, where the wheat was to be delivered, or,

The Company was the agent of the consignees there, and,

The provisions of the bill of lading that "freight and charges should be paid upon the actual and complete delivery of the goods to said consignees or their assigns," means simply, on the delivery at Port Colborne—on delivery where the carrier contracted to deliver.

The criticism of the opinion pronounced in the District Court on this part of the bill of lading is not correct. The language means no more than on delivery at Port Colborne.

5. Such being the facts in the case as illustrated by the circumstances, it follows: that the governing contract was, that the property should be carried by ship owner to Port Colborne, and there delivered, and the carrier should there receive his freight.

IV.

By the provisions of the bill of lading itself, taken in connection with Goodenow's explanation of the word *via*, and the circumstances of the case, and the character of the vessel, it appears that the contract was to carry to Port Colborne, and there the ship owner should earn and be entitled to receive freight.

1. This appears from the fact, that the property was to be in the care of the Welland Railway at Port Colborne, and to be carried from there by rail or steam, from the fact that the freight to Port Colborne is fixed separately, that separate freight is to be paid the Railway Company for the carriage from Port Colborne; and that the agents of the claimants made a separate contract as to each of these portions of the complete contract of carriage, with different parties, as is shown by the testimony, (Fol. 43,) and by the bill of lading. (Fol. 40.)

2. The bill of lading shows that it was contracted that the freight should be paid when the *vessel's* delivery was complete.

V.

It being established that the vessel was only compelled to carry to Port Colborne, and only responsible for the carriage thus far, and it being conceded for this purpose, as will be established under subsequent points, that the owner was there compelled to receive the cargo from the vessel, it follows: that as the ship owner did all he could to make a complete delivery: and the owner of the cargo not being there to receive the property, the ship owner in legal effect had made a complete delivery and was entitled to receive freight.

It also being established that the duty of the ship owner should have terminated at Port Colborne, and he was there entitled to receive his freight, as the owner of the cargo did not provide means to there receive the cargo in a reasonable time, under the circumstances of the case, the libellant is entitled to a decree for his freight, demurrage, charges, &c., under the following Points:

VI.

The ship owner is entitled in some way to be reimbursed for the damages suffered on account of the delay.

The ship owner did all he could to perform his contract. It was the duty of the owner of the cargo to provide means at the port of delivery for unlading the cargo. The owner of the cargo not providing these means, the ship owner was right in delivering his cargo at *the nearest practical commercial point*, which was Buffalo. (Fol. 49.) He was not compelled to wait for days to his great detriment, and look to the possibility of recovering his damages of the shipper, or ultimate consignee, while that owner or consignee was continually guilty of breaking his contract by not providing means for unlading the vessel.

1 Parsons on Mar. L., 151, note.
Bradstreet *vs.* Baldwin, 11 Mass., 228, 231.
Clendaniel *vs.* Tuckerman, 17 Barb. S. C. R., 184.

In this last case the whole doctrine insisted upon by the libellant is held, that it is the duty of the consignee to receive, that he must do this within a reasonable time, that his duty and responsibility in this respect is precisely the same, after the reasonable time has elapsed, as in the case where lay days, and demurrage are expressly stipulated for in the bill of lading, and that after that reasonable time has elapsed the ship owner may store his cargo elsewhere and recover his freight and damages. It further holds that it is the duty of the carrier under such circumstances to store the goods in some place of safety, retaining his lien for his freight, etc.

"The charterer cannot escape from liability upon "his express covenent or promise to pay demurrage.

"by showing that the delay was occasioned by some "unforeseen event not provided for by the contract. "such as the crowded state of the docks," etc., and it is claimed his implied agreement has the same extent.

Addison on Contracts, 487, and cases.
Randall *vs.* Lynch, 2 Camp. N. P., 352.
Powell *vs.* Myers, 26 Wend., 591.

Upon the arrival of a steamboat at the place of delivery, the responsibility of the owner as a common carrier for baggage terminates within a reasonable time thereafter, unless the property is taken away by the owner.

The Grafton, Olcott, 43.

A ship cannot be compelled to lay idle because some consignees apprehend bad weather and decline to receive the cargo, etc., etc.

Barker *vs.* Hudgson, 3 Maule. & S., 267.
1 Parsons on Mar. L., 170, citing.
Rice *vs.* Clendenning, 3 Johns. Cas., 183.

"If a vessel, after her arrival in port, is ordered to "perform quarantine, and the cargo is landed and "stored in the quarantine ground, the shipper or con- "signee is bound to pay the expense of landing and "storage."

Any case holding anything like the contrary of these principles, as for instance, the cases in 2 Campbell's N. P., depend on absolute proof of the custom of a commercial port, (like the port of London,) that ships should wait their turn. *Beside in those cases there is an utter absence of proof that in such cases the property could have been practically delivered or disposed of in any other way.*

Suppose in those cases it had appeared that the property could have been delivered at another dock? Would not the ship owner have a right to deliver there and claim freight? Beyond all question. *The*

different ports around the Western Lakes are really in principle, other docks, as to Western produce seeking its market on the sea board.

The damages resulting from the breach of the contract, on the part of the owner of the cargo, may be recovered on the principle that the master, being under such circumstances, the agent of the cargo owner, and in many cases, as for instance in cases of trans-shipment after accident, can charge the owner of the cargo with additional expenses.

1 Parsons on Mar. L., 163.
Bock *vs.* Norton, 2 McLean. 422.

Whoever may have been the consignee at Port Colborne, the master was unable to find anybody there to whom to deliver the cargo. Under such circumstances, and it was his duty to do precisely as he did with the cargo—under such circumstances, having done all things possible for him to do, he can recover his freight and added charges.

Fish *vs.* Newton, 1 Denio, 45.

Nor was it at all necessary that the master should have telegraphed to Oswego, as intimated in the opinion of District Court. There is not a particle of proof of any custom to do so. The carrier's business was to perform his contract according to law. It has been shown he did. *He was not compelled to telegraph to the cargo owners for the purpose of ascertaining whether they would make a new contract.* There is no where to be found a particle of authority for any claim that such notice should be sent. If the fact that telegraphs are of modern date and therefore may change the principles, then let it also be considered that the Western ports, and the carriage of wheat for an Eastern market, make this case not analogous to a case involving a ques-

tion as to the delivery of property at a port like London or New York—property to be delivered to a merchant for use or sale there.

A delivery, if according to the custom, though not personal, is entirely good without notice.

The Grafton, Olcott, 43, 48.
Gibson *vs.* Culver, 17 Wend., 305.

In this case a delivery was made, that is the carrier did every thing possible for him to do, and no notice is required.

Why require notice to a man whose business it was to be at the port and there absolve himself from his responsibilities to receive the cargo? Besides the proof is absolutely conclusive that nothing could be done with the property at Port Colborne. The law will not require a futile notice.

The whole doctrine in relation to notice in any case only applies, and in sense, only can apply where the owner or consignee is at the port, and can in some way take possession of the property. This he could not do at Port Colborne. The District Court (and its opinion is referred to for the reason that it is more elaborate than that of the Circuit,) also erred in terming Port Colborne an intermediate port. As to the parties to this contract it was the ultimate port.

The proof beside is specific that it was not the custom to give notice. (Fol. 54.)

VII.

A lien exists on the cargo for all charges growing out of a breach of the contract of affreightment, for the ship is bound to the cargo and the cargo to the ship. The owner

of the cargo has a lien on a ship for a breach of the contract of affreightment caused by delay in delivering the property. The ship owner has a lien on the cargo for his right to earn freight, (for his lien *is the maritime lien of a ship owner*, and not the common law lien of a carrier. (1 Parsons on Mar. L., 127.) and for many other things, as for instance a general average contribution, as he has also a lien for that breach of the contract of affreightment caused by the cargo owners' neglect to receive the goods he has contracted for, in a reasonable time.

Abbott on Ship. 126, 127, (168,) note.
3 Kent's Com., 218.
1 Parsons on Contracts, 122, 128, 158.
The Volunteer, 1 Sumner, 551.

It is not contended that there is a *common law carrier's* lien for demurrage, but that there is a maritime lien as there is for the right to earn freight.

VIII.

The libellant in this case acted precisely in accordance with the custom (and the proof is uncontradicted) of the ports on the Western lakes.

1. The custom as proven to exist, taken in connection with the character of this business, and the actual market for the property, is in every respect reasonable.

2. There is not a particle of dispute as to what it is, (there being no conflicting evidence,) or that it was well known, or that it was general.

3. The language of the opinion of the District Court, as to there being either a *port* or a *custom* at what is called Port Colborne, is used certainly under great misapprehension. *The place consists of one elevator standing at the head of a canal, and that is all.* (Fol.

49.) It might as well have been termed the Welland Railway's Elevator. Had it been thus named, it is fair to assume the District Court would hardly have fallen into the error of terming the place a port, or conclude that proof that it "was the habit of an elevator to unload vessels in their turn" (which is doubtless true everywhere,) was any proof of a *custom* at a *port*. The proof by the witnesses that they had not known any special instance where a vessel has sought another port, proves nothing. It comes within the custom which was to seek *the nearest practical place for delivering the property*, and parties situated as this libellant was, in the opinion of witnesses swearing to the custom, have and claim the right so to do. (Fol. 53.)

Were this property ordinary goods, and not *Western produce seeking a sea board market*, the custom would be different and perhaps unreasonable.

Of course a delivery recording to custom is good.

1 Parsons on Mar. L., 152.

To say that the master knew about the place and should have provided against delay by special contract, begs the whole question. The shipper also knew about the place. *It was his duty to see that the property was received, and if he desired to qualify that duty he should have provided for it in the contract.*

IX.

Whatever else may be thought, this is plain, that the libellant should recover his freight.

He did all he could; if the owners of the cargo were prejudiced by the failure of the Railway Company to receive the property, they must seek their

remedy against that Company under their contract to perform the carriage of the property from Port Colborne. That contract was made with the agent of the Railway Company. (Fol. 40.)

The owner of the cargo sustained no damage, none having been proven.

The libellant has been paid no portion of his freight, and therefore (this libel being filed to recover the freight,) should recover it here.

Whatever doubt (if any there be,) as to a lien on a cargo for demurrage, there is of course no doubt as to the lien for freight.

X.

The decision in this case should depend on authority and principle. No authority or principle, it is submitted, is referred to in the opinion, pronounced in the District Court. Upon authority and principle a decree should be pronounced in favor of the libellant. Such a decision would establish a safe and reasonable rule in all analogous cases.

GEORGE B. HIBBARD.

For Appellant, Buffalo, N. Y.